# Jurisdictional Statement

Office-Supreme Court, U.S.
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AUG 31 1981
ALEXANDER L. STEVAS,
CLERK

81-478

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

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STEPHEN D. RABIDEAU
Appellant,
vs.

ATTORNEYS BOARD OF PROFESSIONAL RESPONSIBILITY, STATE OF WISCONSIN
Appellee

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ON APPEAL FROM THE SUPREME COURT
OF WISCONSIN

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# JURISDICTIONAL STATEMENT

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Stephen D. Rabideau

9925 Lyndale Av. So., No. 719

Bloomington, MN. 55420

Pro Se

August 28, 1981

## QUESTION PRESENTED

Does Wisconsin Supreme Court Rule SCR 21.05(1) violate due process as required of states by Amendment XIV, United States Constitution?

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### CASES

Attorney Grievance Commission v. Andresen, 281 Md. 15, 379A2d 159, 162 (1977)

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Otash v. Bureau of Private Investigators and Adjusters, 230 Cal. App. 2d 568, 41 Cal. Rptr. 263 (1965)

Rice v. Alcoholic Beverage Control Appeals Board, 89 Cal. App. 3d 30, 152 Cal. Rptr. 285 (1979)

State v. Adkins, 40 Ohio App. 2d 473, 320 NE2d 308 (1973)

State v. Fournier, 123 Vt. 439, 193 A2d 924, 925 (1963)

State v. McCarthy, 255 Wis. 234, 38NW2d 679, 686 (1949)

U.S. ex rel Ciarello v. Reimer, 32 F. Supp 797 (S.D. N.Y. 1940)

OTHER AUTHORITY

Webster's Third New International Dictionary (1976)

OPINIONS BELOW

The opinion of the Supreme Court of the State of Wisconsin is reported at 306 Northwestern Reports (Second), p. 1 et seq. and appears at Appendix A, infra, pp. A-1 et seq. The Referee's Report and Disposition is unreported, and appears at Appendix B, infra pp. A-21 et seq.

STATEMENT OF GROUNDS OF JURISDICTION

This is an appeal from a State of Wisconsin bar disciplinary proceeding,

which is an original proceeding in the Supreme Court of Wisconsin.

The date of the filing of the Opinion (including judgment) of the Supreme Court of the State of Wisconsin in this case was June 2, 1981. See Appendix A, infra, p. 1a. This appeal was taken by Notice of Appeal filed August 28, 1981, within 90 days from the date of aforesaid, in compliance with 28 U.S.C. 2101(c), in the Supreme Court of the State of Wisconsin. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2), in that the judgment aforesaid of the Supreme Court of the State of Wisconsin held in favor of the validity of a rule of said court, having the effect of statute of said state, against Appellant's

contention of its repugnance to the Constitution of the United States.

## CONSTITUTIONAL PROVISION AND REGULATIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Wisconsin Supreme Court Rule SCR 20.04(3):

> "Misconduct. A lawyer shall not . . . (3) Engage in illegal conduct involving moral turpitude."

Wisconsin Supreme Court Rule SCR 21.05(1):

> "Grounds for discipline. An attorney is subject to discipline for misconduct. Misconduct is conduct that violates:

(1) A criminal statute if the violation involves moral turpitude."

STATEMENT OF THE CASE

The facts relevant to the question presented by this petition are uncontroverted and therefore may be introduced to the Court in a summary fashion.

FIRST: In May 1978, petitioner was admitted to practice law in the State of Wisconsin. On November 12, 1979, petitioner, upon a plea of guilty, was convicted in the Circuit Court of Clark County, Wisconsin, of violating Wisconsin Statutes Annotated, secs. 947.15(1)(a) (contributing to the delinquency of a minor), and 161.41(3) (possession of a controlled substance). The allegations of the criminal complaint aver that both charges stemmed from the sharing of a

"joint" of marijuana between petitioner and a minor, age 16.

SECOND: On January 15, 1980 the respondent Board filed a complaint with the Supreme Court of the State of Wisconsin, seeking revocation of petitioner's license to practice law, based on the aforesaid conviction. Specifically, respondent's Complaint alleged that petitioner's conduct constituted "illegal conduct involving moral turpitude" in violation of Wisconsin Supreme Court Rules SCR 20.04(3) and 21.05(1). Petitioner has had no other disciplinary matters before the bar and no other criminal convictions.

THIRD: The Matter was referred to the Clerk of Circuit Court of Clark County for hearing before a specially

appointed referee, all pursuant to Wisconsin Supreme Court Rule SCR 21.09(4). Hearing was held July 3, 1980. On August 20, 1980 the referee, pursuant to Wisconsin Supreme Court Rule SCR 21.09(5), reported his finding that the criminal conviction "represented a violation of a criminal statute involving moral turpitude and as such was misconduct in violation of SCR 21.05". He ordered revocation of petitioner's license to practice law, and imposed other conditions not material herein.

FOURTH: Petitioner appealed from the order of the referee to the Supreme Court of the State of Wisconsin, asserting several arguments in his brief to the Court, including the sole question

presented herein: whether the use of the term "moral turpitude" is constitutionally permissible as a basis for the imposition of discipline of an attorney. The Supreme Court of the State of Wisconsin held, interalia, that such term was not void for vagueness in that application, and imposed modified discipline in the form of a three-year suspension of petitioner's license to practice law, with conditions of reinstatement. The Opinion of the Supreme Court embodying that holding and that judgment was filed June 2, 1981. The Supreme Court of the State of Wisconsin has original jurisdiction of disciplinary actions against attorneys, and hence is the court of first instance in this case.

## REASONS WHY PLENARY CONSIDERATION IS REQUIRED

The contention of Appellant is a question of the federal Constitution that has never been decided by this Court in the present context. Questions of due process are not to be taken lightly, but are substantial by nature. In the case at bar, Appellant challenges the phrase "moral turpitude", as being unconstitutionally vague. Vagueness is the very heart of objections to statutory law based on the due process clause.

Due process must be accorded in administrative licensing matters. Board of Regents v. Roth, 408 US 564, 577, 92 SCt 2701 (1972). Despite frank admissions of the lack of any firm definition

for, and of the vague and indefinite nature of that phrase (see e.g.: Rice v. Alcoholic Beverage Control Appeals Board, 89 Cal. App. 3d 30, 152 Cal. Rptr. 285 (1979); U.S. exrel Ciarello v. Reimer, 32 F. Supp. 797 (S.D. N.Y. 1940)). and despite the amorphous and circular definition of the term found in Webster's Third New International Dictionary (1976) and in cases such as: State v. Adkins, 40 Ohio App.2d 473, 320NE2d 308 (1973); In re Calaway, 20 Cal 3d 165, 570 P2d 1223 (1977); Attorney Grievance Commission v. Andresen, 281 Md. 152, 379A2d 159, 162 (1977); Otash v. Bureau of Private Investigators and Adjusters, 230 Cal. App. 2d 568, 41 Cal. Rptr. 263 (1965); and State v. Fournier 123 Vt. 439, 193A 2d

924, 925 (1963), the term "moral turpitude" is repeatedly still applied today to deny persons benefits, property rights and even liberty in a broad variety of contexts. In an age when many professions and businesses require licensure by state governments based in part on consideration of "moral turpitude", and when reciprocity buds rampant between states regarding such determinations, it is not sufficient to dismiss the constitutional question involved as either de minimis, or not involving application of criminal law, or being of purely state concern.

Indeed, the handling of the question of "moral turpitude" below runs quite contrary to that in In re Fahey, 8 Cal

3d 842, 106 Cal Rptr 313, 316 (1973) regarding subjective motivation. As is predictable where such a phrase is employed, application becomes wholly inconsistent. It all boils down to a matter of opinion. Muniz v. State, 575 SW2d408, 411 (Tex. Civ. App. 1979). Of course, whose opinion is left open, even to the extent of allowing the importation of theology. See State v. McCarthy, 255 Wis 234, 38NW2d 679, 686 (1949).

Because of the inherent ambiguity in common definitions employed with regard to the term, and the varying pronouncements and differing applications given it over time, the vagueness of that term renders it impossible to know in advance under what circumstances bar

discipline may be imposed. Hence the employment of "moral turpitude" inquiry below has deprived Appellant of due process as guaranteed by the Fourteenth Amendment. Serious scrutiny of this objection and reversal are both warranted.

Respectfully submitted,

s/_____
Stephen D. Rabideau
Pro Se

APPENDIX

NOTICE
This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 80-453-D

STATE OF WISCONSIN : IN SUPREME COURT

FILED
JUN 2 1981
CLERK OF SUPREME COURT
MADISON, WISCONSIN

In the Matter of the

DISCIPLINARY PROCEEDINGS AGAINST
STEPHEN RABIDEAU, ATTORNEY AT LAW

APPEAL from a report and disciplinary order of RODNEY L. YOUNG, Referee.

PER CURIAM. This is an appeal from an order of a referee finding, inter alia, that the respondent-appellant, Attorney Stephen D. Rabideau, was subject to discipline for professional misconduct due to a violation of a criminal statute involving moral turpitude. The referee ordered that appellant's license to practice law be revoked, imposed the costs of the proceeding, and required that proof of payment of such costs (and of certain fines, penalty assessments, and costs of the underlying criminal matter) accompany any future application for reinstatement to the bar. We modify the order by directing, instead of revocation, suspension for three years, subject to conditions of reinstatement discussed later in this opinion, and we sustain the imposition of costs of the disciplinary proceeding and the requirement that they be paid prior to reinstatement in the bar. We reverse that part of the referee's disposition ordering that payment of fines, penalties, and costs imposed in the criminal prosecution be made a condition of reinstatement.

On January 15, 1980, the Board of Attorneys Professional Responsibility filed a complaint with this court alleging that on November 12, 1979, Attorney Stephen D. Rabideau, upon a plea of guilty, had been convicted in the Circuit Court for Clark County of violating secs. 947.15 (1) (a) (contributing to the delinquency of a minor), and sec. 161.41 (3) (possession of a controlled substance), Stats., and furthermore had not fully paid the fines and penalties imposed pursuant to his conviction. The complaint alleged that respondent's conduct constituted illegal conduct involving moral turpitude "in violation of DR 1-102(A)(3), a lawyer's disciplinary rule now numbered as SCR 20.04 (3) (1980).[1/] The complaint further stated that certain activities with minors in which the respondent had allegedly engaged in 1975 would be relevant to the appropriate discipline.

We referred the matter for hearing to the Clerk of Circuit Court for Clark County pursuant to SCR 21.09 (4) (1980), appointing Rodney L. Young of Wausau as referee. Hearing was held on July 3, 1980.

The evidence adduced at hearing shows that Attorney Rabideau graduated from the University of Wisconsin Law School in 1975 and was admitted to the Wisconsin bar in May of 1978. After serving for a few months as Assistant Attorney in the District Attorney's office of Burnett County, he went into practice in Neillsville, Wisconsin, in September 1978.

Rabideau testified that on the evening of August 24, 1979, he was at a school swimming pool, where he had a chance

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1/ SCR 20.04 (3) (1980) provides:

"SCR 20.04 Misconduct. A lawyer shall not:

"(3) Engage in illegal conduct involving moral turpitude."

meeting with a youth whom he had represented in juvenile proceedings the previous fall, as a court-appointed attorney. The youth, aged sixteen, and not at that time Rabideau's client, was a resident of the Sunburst Youth Home. Rabideau testified that the youth asked him for a ride back to Sunburst, permission for which was obtained from a supervising counselor. Rabideau stated that he had recently heard reports of mistreatment at the facility and was concerned about such matters, because he had represented other Sunburst youths, and was concerned about this particular youth's mental and physical well being. He said he hoped to use the car ride as a means of finding out more information and offering his concerned attention. According to Rabideau, the youth asked if he had any marijuana in the vehicle. Rabideau did; he acceded to the request, and they shared a marijuana cigarette, which he thought "would facilitate [the youth's] receptiveness to my sincere concern."

Testimony and exhibits introduced at the hearing also showed that on September 21, 1979, the Clark County Sheriff's Department searched Rabideau's apartment, with a warrant, and found therein some marijuana, apparently about two-three grams (an amount Rabideau described as "five or six finger pinches." After plea negotiations, Rabideau pleaded guilty on November 12, 1980, to charges of contributing to the delinquency of a minor (sec. 947.15 (1) (a), Stats.) and possession of a controlled substance (sec. 161.41 (3)1 The court sentenced him to a $2,000 fine on the first count, $500 on the second, and court costs ($9), with sixty days to pay. 2/

2/ The Board of Attorneys Professional Responsibility asserts that the court also imposed a $250 penalty assessment. Rabideau disputes this claim. For reasons which will appear, we need not and do not resolve this dispute.

A sixty-day extension was sought and granted because of Rabideau's financial inability to meet the deadline; at least some payments have been made since then.

Additional evidence was adduced at the hearing. Certified copies of files of the Dane County District Attorney and the Dane County Criminal Court were introduced, dating from 1975, indicating that criminal complaints were initiated against Rabideau that year for several episodes of allegedly taking indecent liberties with children. Another exhibit was introduced which showed that the state and Rabideau at that time stipulated that the state would dismiss these charges, without prejudice, if Rabideau agreed to psychiatric treatment and met certain other conditions. According to the terms of the agreement, which apparently were met, the state agreed not to prosecute at all if the agreement were followed without violation for eighteen months. The other condition relevant to these proceedings provided:

> "3) That both parties agree that at the request of any duly authorized official of the State Bar of Wisconsin, or the Wisconsin Supreme Court, that the file of the District Attorney's Office, including all the allegations contained in the above complaints for the above cases would be available to the officials of the State Bar or the Supreme Court for their consideration in determining whether the defendant qualifies to practice law in the State of Wisconsin."

Rabideau was admitted to the bar in May 1978 after a full review of these matters and their bearing on his fitness to practice law.

Rabideau's attorney objected to the admission of these exhibits at the hearing on the grounds that they were relevant only to his bar admission, not subsequent disciplinary proceedings; that they were "res judicata" as they had been reviewed prior to his bar admission; that their admission violated due process and ex post facto constitutional provisions; and that attorney disciplinary rules are not intended to

apply to conduct prior to bar admission. Rabideau testified that he thought the entire matter of the 1975 conduct and criminal proceedings had been resolved at his bar admission proceedings.

Rabideau's criminal conviction for the 1979 charges led him to leave his law practice in Neillsville and move to San Francisco, where at the time of hearing he was doing legal research for other attorneys.

On August 20, 1980, the referee, pursuant to SCR 21.09 (5) (1980), found that the criminal conviction "represented a violation of a criminal statute involving moral turpitude and as such was misconduct in violation of SCR 21.05." He also found that Rabideau's conduct and purported justification therefor, "when viewed in the light of his previous criminal misconduct," called for a severe penalty "for the purpose of protecting the public interest so that there may be assurance of the moral fitness and professional responsibility of everyone licensed to practice law in the State." He ordered revocation of Rabideau's license and the other conditions described. Rabideau appealed to this court from the referee's report and disposition, pursuant to SCR 22.17 (1980).

Rabideau has apparently not had any disciplinary matters or complaints before the bar other than the present one, and no other criminal convictions.

Appellant Rabideau raises numerous arguments before this court, challenging both certain aspects of the general operation of the disciplinary rules and the specific terms of the referee's findings and order in this case. We consider these claims seriatim.

The first claim is a challenge to the constitutionality of SCR 21.05 (1) (1980). That rule provides:

"SCR 21.05 Grounds for discipline. An attorney is subject to discipline for misconduct. Misconduct is conduct that violates:

"(1) A criminal statute if the violation involves moral turpitude."

Appellant argues that this rule, pursuant to which the referee found him subject to discipline, provides insufficient notice as to whether or not a particular violation of a criminal statute involves "moral turpitude," and thus that it is void for vagueness, in violation of due process provisions of the United States and Wisconsin Constitutions. 1/ We reject this argument, as we recently did a similar challenge to the Code of Judicial Ethics, In Matter of Complaint Against Seraphim, 97 Wis. 2d 485, 497-99, 294 N.W. 2d 485 (1980).

The text of SCR 21.05 (1) (1980) shows that a violation of a criminal statute does not ipso facto justify the imposition of discipline; moral turpitude is also required. This is not a new requirement in the history of attorneys' discipline, but merely a recent codification of a longstanding practice observed by this court and others. As we stated in State v. Roggensack, 19 Wis. 2d 38, 46, 119 N.W. 2d 412 (1963), "[Not] . . . every violation of law by an attorney will subject him to discipline. As a general rule, before such violation will be a ground for discipline it must entail moral turpitude as defined in State v. McCarthy . . . ." See also State v.

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1/ The complaint in this case filed by the Board of Attorneys Professional Responsibility did not invoke this court rule, but instead alleged that petitioner's conduct was illegal conduct involving moral turpitude "in violation of DR 1-102(A)(3)." That disciplinary rule is now found at SCR 20.04 (3) (1980), which, under the title, "Misconduct," provides that "A lawyer shall not: . . . Engage in illegal conduct involving moral turpitude." For purposes of notice of the disciplinary charges, there is no material difference in this case between the language of SCR 20.04 (3) (1980) ("illegal conduct involving moral turpitude") and SCR 21.05 (1) (1980) ("A criminal statute if the violation involves moral turpitude.")

Postorino, 53 Wis. 2d 412, 415, 193 N.W. 2d 1 (1972); In re Richter, 187 Wis. 490, 504, 204 N.W. 492 (1925); Note, The Imposition of Disciplinary Measures for the Misconduct of Attorneys, 52 Col. L. Rev. 1039, 1049 (1952).

The case of State v. McCarthy, 255 Wis. 234, 38 N.W. 2d 679 (1949), referred to in Roggensack, supra, sets forth what is meant by "moral turpitude." Therein we said:

> "In our society moral standards are derived in large part from Christian teaching and are reflected more or less accurately in what is termed 'public opinion,' which is the consensual judgment of the general public . . . .
>
> ". . . .
>
> "'Moral turpitude is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.' [citation omitted]
>
> ". . . .
>
> "'. . . moral turpitude is anything done contrary to justice, honesty, principle or good morals . . . .' [citation omitted]." Id. at 248-50.

We recognize, as indeed we did in State v. McCarthy, that there is an inherent generality and indefiniteness to the phrase, "moral turpitude." We acknowledged in that case that whether a person's conduct indicates moral turpitude "depends upon the circumstances of each case. The same rule cannot be applied to every case involving a violation of law." Id. at 250.

The generality of the concept, however, renders it neither meaningless nor constitutionally infirm as to adequacy of notice.

In the first place, an attorney who knowingly violates any criminal statute should not be heard to claim insufficient notice of the general culpability of his conduct, especially in light of the heightened awareness of the law

and heightened responsibility to respect it with which an attorney is properly charged. See SCR 20.02(5)(1980); Ex parte Wall, 107 U.S. 265, 274 (1882).[4/] Any lawyer knowingly engaging in criminally proscribed conduct can properly be charged with an awareness of the possible jeopardy in which such activity may place his professional status.

The secondary inquiry--whether the criminal violation involves moral turpitude--involves a rough, but permissible, assessment of the moral character of the particular criminal activity. Not all "turpitudinous" crimes could reasonably be listed; a fixed list would likely, as applied to particular situations, be both over- and underinclusive. Moreover, the differing moral quality of criminal behavior in various situations necessitates a flexible approach to the assessment of discipline-worthy criminal conduct, one not hamstrung by rigid "laundry lists" of behavior. A responsible attorney should have no cognitive problem recognizing that criminal actions of different sorts may strike a factfinding tribunal as more or less morally reprehensible, and should be able to tailor his own behavior accordingly.

We are satisfied, in light of these considerations,

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4/ SCR 20.02(5) (1980), Ethical Consideration, provides in part:

"A lawyer should be temperate and dignified and should refrain from all illegal and morally reprehensible conduct. Because of a lawyer's position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude."

Justice Bradley stated in Ex parte Wall, supra, 107 U.S. at 274:

"Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, . . . argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve." (Quoted in Roggensack, supra, 19 Wis. 2d at 45.

that SCR 21.05 (1) (1980) is not unconstitutionally vague.

Appellant makes the related argument that "moral turpitude," the second element of SCR 21.05 (1) (1980), is so broad and has been subject to such varying interpretations that it in effect adds nothing to the "violation of a criminal statute" element of the rule; and, hence, disciplinary proceedings based on a criminal conviction in reality amount to reprosecution and repunishment for the same offense which underlies the disciplinary proceeding, in violation of the Wisconsin constitutional provision against double jeopardy, Wis. Const. art. I, sec. 8. That provision states, in relevant part, that ". . . no person for the same offense shall be put twice in jeopardy of punishment . . . ."

Our response to this allegation is twofold. First, as we have discussed above, the requirement of moral turpitude is a genuine second element which must be additionally found before discipline may be imposed for misconduct under SCR 21.05(1)(1980); thus, the disciplinary proceeding is not based on "the same" legal charge as the prior, underlying criminal conviction. By analogy to our treatment of lesser-included offenses, the requirement of moral turpitude clearly makes misconduct in violation of SCR 21.05(1)(1980) a different legal entity than the offenses signified by underlying criminal convictions which, as here, contain no statutory element of "moral turpitude." See Randolph v. State, 83 Wis. 2d 630, 266 N.W. 2d 334 (1978); Hagenkord v. State, 100 Wis. 2d 452, 481, ___ N.W. 2d ___ (1981). Identification of this different "element" renders a violation of SCR 21.05(1)(1980) different from the underlying criminal convictions irrespective of "the peculiar facts of a given case." Randolph, supra, 83 Wis. 2d at 642.

More important, however, is the difference between an attorney disciplinary proceeding, which is not a charge of a criminal offense, and a criminal conviction. Disciplinary proceedings are civil in nature. Matter of Proceedings Against Sedor, 73 Wis. 2d 629, 636, 245 N.W. 2d 895 (1976); State v. Postorino, 53 Wis. 2d 412, 417, 193 N.W. 2d 1 (1972). Disciplinary proceedings do not constitute a second "trial," nor is the sanction which may be imposed a secondary penalty or punishment. Rather, the primary purpose of a disciplinary proceeding is the ascertainment of moral fitness and professional competency of the attorney, and a determination of whether it is necessary for the protection of the public interest that the attorney be disciplined, suspended, or disbarred. State v. Corry, 51 Wis. 2d 124, 186 N.W. 2d 225 (1971); SCR 21.03(5)(1980).[5/] These are public interests not addressed by the underlying criminal proceeding.

Whatever ancillary punitive effects might be said to attach in a practical sense to an attorney's civil disciplinary proceeding do not violate the state constitutional proscription against being put twice in jeopardy of "punishment" for the same "offense."

Appellant also argues that his criminal violations did not, under the circumstances, involve moral turpitude, and thus discipline is unwarranted under SCR 21.05(1)(1980). The claim that no moral turpitude was evinced rests on several factors.

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5/ This rule provides:

"SCR 21.03 General principles.

". . . .

"(5) Discipline for misconduct is not intended as punishment for wrongdoing but is for the protection of the public, the courts and the legal profession . . . ."

The first is that the illegal activity did not occur in appellant's professional capacity as an attorney. The record appears to support this claim as a factual matter.[6/] This does not, however, ipso facto immunize an attorney from discipline. Some of our earlier cases appear to have attempted to draw a bright line between professional and nonprofessional activity. This approach was expressly overruled in State v. Roggensack, 19 Wis. 2d 38, 48, 119 N.W. 2d 412 (1963). More recently we stated, where an attorney had been convicted of commercial gambling and was before this court on a disciplinary hearing:

> "While his conduct is not unprofessional in the strict sense of the word because it did not relate to an activity in a professional capacity, nevertheless, the concept of unprofessional conduct now embraces a broader scope and includes conduct outside the narrow confines of a strictly professional relationship that an attorney has with the court, with another attorney or a client. There are many activities in the minds of the public which a professional man should not undertake because he is a professional man of trust and much is expected of him. A lawyer is a professional man twenty-four hours a day, not eight hours, five days a week." State v. Postorino, supra, 53 Wis. 2d at 419. [7/]

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6/ Nothing in the record ties the conviction for possession of a controlled substance, sec. 161.41 (3), Stats., to any activity by the petitioner as an attorney. We accept that the same is true with respect to the charge of contributing to the delinquency of a minor, sec. 947.15(1)(a), Stats. We note, however, as to the latter conviction, that although the youth was not a client of petitioner's at the time of the criminal activity, he had been one within the preceding year, and that petitioner's rationale for sharing marijuana with him was concern for both the youth's welfare and that of the residents of the Sunburst Youth Home, some of whom had also been clients of petitioner. Although we do not base our disposition of this matter on a view that petitioner was acting within a lawyer-client relationship at the time of his transgression, we think the factual background suggests his activities were closer to being in the course of his legal representation than petitioner describes.

7/ Ethical consideration (5) of SCR 20.02 (1980) provides that a lawyer should "refrain from all illegal and morally reprehensible conduct. Because of a lawyer's position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession." Although this is not a mandatory provision independently providing grounds for discipline, in enforcing SCR 20.05(1)(1980), we are authorized by SCR 20.002 (1980) to rely on it "for interpretive guidance in the basic principles embodied in the canons and in the objectives reflected in the ethical considerations."

The fact that appellant was not acting in the professional capacity of an attorney when he violated the criminal law of the state does not defeat the imposition of discipline.

Appellant also argues that there was no moral turpitude here because the prevailing moral sentiment no longer condemns the possession and use of small amounts of marijuana. In light of the continued legislative treatment of marijuana as a Schedule I controlled substance (sec. 161.14(4)(k), Stats.), this claim cannot be sustained. Moreover, this legislative policy judgment distinguishes the offense from one involving alcohol, which appellant proffers as being similar. Whatever may have been appellant's personal preferences and motivations in possessing and sharing marijuana, we cannot, in light of the expressed public policy of the state, hold that his conduct comports with prevailing moral sentiment.

More fundamentally, appellant was convicted not merely of use or possession, but of contributing to the delinquency of a child in violation of sec. 947.15(1)(a), Stats.[8/] This is not a "victimless" crime; the statute

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8/ Section 947.15(1)(a), Stats., provides:

"(1) The following persons are guilty of a Class A misdemeanor . . . :

"(a) Any person 18 or older who intentionally encourages or contributes to the delinquency of any child as defined in s. 48.02(3m) or the neglect of any child . . . ."

criminalizing this behavior plainly contemplates that one who engages in such conduct threatens the welfare of a person of tender years. Whether, as appellant argues, the youth herein requested the marijuana, prompting appellant to supply it as "the result of sudden impulse and unexpected provocation resulting in thoughtless commission of the violation without serious thought of the consequences," is not the point. Section 947.15 (1) (a), Stats., prohibits "contributing" to a minor's delinquent behavior just as clearly as it prohibits "encouraging" it. An adult, under the statute, has a duty to refrain from such activity as appellant engaged in. There is clearly a moral aspect to this behavior, and under the circumstances it may be characterized as turpitudinous.[9/]

We have noted that, at the disciplinary hearing, the Board of Attorneys Professional Responsibility introduced, over objections by the appellant, documents stemming from criminal charges filed against him in Dane County in 1975 relating to several episodes of allegedly taking indecent liberties with children. These matters were reviewed by the bar and this court upon appellant's application and admission

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9/ We note, in addition, that the marijuana was shared while petitioner was driving the youth back to a youth home. We think that this adds another element of moral irresponsibility--the danger, to passengers and other drivers, of driving under the influence, just as in the case of driving under the influence of alcohol. Petitioner cites to us, as authority for the benign effects and quality of marijuana, L. Young, et al., Recreational Drugs (1979). While we intimate no position on such matters, we quote from the chapter on marijuana, which otherwise extols the benefits and pleasures of recreational use of the drug:

"It seems safe to recommend that an inexperienced pot user should not drive, or at least should abstain from driving until he gets used to the drug's effects. There is no doubt that marijuana alters perceptions and reflexes, and both are needed to drive safely. Some claim that experienced drivers can, however, call upon their compensation factor and drive confidently, without noticeable impairment. But, your best bet is to avoid all intoxicants, if possible, when getting behind the wheel. If the thought of driving stoned makes you feel uncomfortable, listen to your head and give the car keys to a friend." Id. at 140.

to the bar in May of 1978, and did not preclude his admission. Appellant now argues, for numerous reasons, that their consideration in the instant disciplinary proceeding is improper. The central thread in all these arguments is that conduct prior to bar admission, once admission has been granted, cannot properly be taken into account in a disciplinary proceeding for misconduct alleged to have occurred after admission.

At the outset, we observe that the Board's complaint, and the referee's findings, were careful to limit consideration of these 1975 charges to the proper discipline to be imposed, rather than as substantive evidence of appellant's present wrongdoing as an attorney. Thus appellant's first objection--that, under SCR 21.05(1)(1980), pre-bar admission conduct cannot be the "subject" of disciplinary proceedings for attorney misconduct--does not accurately describe the purposes for which the 1975 records were admitted and considered. We note, moreover, that evidentiary rules of relevance applicable to criminal proof of guilt, or establishment of civil liability, in normal litigation, are not in any event entirely applicable to the attorney disciplinary process. Prior conduct occurring before bar admission may be relevant to the choice of discipline, and even to questions of character, which might be inappropriate to consider in other proceedings given the different nature and purposes of disciplining an attorney.

Appellant argues that admission and consideration of his 1975 encounters with the criminal law constitute an ex post facto application of SCR 21.05(1)(1980), in violation of Wis. Const. art. I, sec. 12, and United States Const. art. I, sec. 10, cl. 1.[10/] As we have recently held, however, there is

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10/ "Section 10. No state shall . . . pass any bill of attainder, ex post facto law . . . ."

no ex post facto prohibition except in criminal proceedings or matters where penalty or punishment is imposed. See In Matter of Guardianship of Nelson, 98 Wis. 2d 260, 272-74, 296 N.W. 2d 736 (1980); see also In Matter of Complaint Against Seraphim, 97 Wis. 2d 485, 493-95, 294 N.W. 2d 485 (1980). We pointed out earlier that attorney disciplinary proceedings are neither criminal nor punitive, but instead aimed at regulating the profession and protecting the public. Moreover, the 1975 criminal charges in this case are not, standing alone, any sort of basis for the present disciplinary proceedings; absent the post-bar admission convictions, this action would never have been initiated.

Appellant further argues that since this court once ruled that an attorney's good behavior, prior to bar admission, would not be considered in mitigation of a subsequent disciplinary proceeding,[11/] notions of equal protection are violated by consideration, during disciplinary proceedings, of bad behavior occurring prior to bar admission. This rather generalized contention ignores the rational basis which supports the differing permissible use of prior conduct evidence--the profession is properly concerned about the moral character of its members, as to which patterns of misconduct, regardless of when they occur, may become relevant to tailoring disciplinary measures; whereas good behavior prior to bar admission is no guarantee of later propriety, nor does it diminish the severity of a transgression occurring after admission.

Appellant also argues that the 1975 matters are "res judicata" and may not be reviewed again because they were considered upon his application to the bar and were found not

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11/ State v. Cannon, 199 Wis. 401, 226 N.W. 385 (1929).

sufficiently flagrant to prohibit his admission in 1978. We reject any implication that the Board of Attorneys Professional Responsibility or this court, by virtue of having once evaluated an attorney's or bar applicant's conduct with an eye to his character and fitness to practice law, loses its authority to review that behavior again upon, and in light of, subsequent misconduct. Nor are we precluded from considering the 1975 matters by the terms of the stipulation entered on January 22, 1976, between appellant and the district attorney for Dane County. That agreement stated that the district attorney's files would be available to the State Bar or this court "for their consideration in determining whether the defendant qualifies to practice law in the State of Wisconsin."[12/] Petitioner argues that this language was intended and understood to apply only to bar admission and thus cannot support consideration of the 1975 matters now; the Board contends that the language, "qualifies to practice," applies generally, without any such limitation, and thus authorizes consideration of these matters in the present proceeding.

We need not decide which view characterizes the intent of the parties to the agreement. The authority of the bar and this court to consider matters pertaining to the qualification to practice law cannot be "waived" or determined by other parties. Moreover, once considered in the initial determination of bar eligibility, the "cognizance" of the bar and this court over such matters is not lost by the mere

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12/ The agreement, entered on January 22, 1976, by its terms "expired" eighteen months later, or July 22, 1977. Petitioner argues that it therefore cannot now be considered. This "expiration date," however, appears to refer to the time after which the district attorney agreed he would not press criminal charges. Thus it does not bar subsequent consideration of the documents for professional disciplinary purposes.

fact of admission. If relevant to the question of initial eligibility, such matters may well be relevant to later disciplinary proceedings, due to the bar's continuing interest in the qualifications of its members; the authority to consider such matters is a continuing one.

Appellant next argues that the revocation of his license to practice law, as ordered by the referee, is too harsh a discipline under the circumstances presented in this case, and that a private reprimand is all that is appropriate.[13/] While we do not accept the idea that a reprimand would be sufficient, we agree that revocation of appellant's license is an inappropriate disciplinary sanction.

The bar, and this court, accepted appellant in 1978 as fit for the practice of law despite his prior misconduct in 1975. Although one of the two 1979 criminal convictions which prompted the present disciplinary proceeding involved a juvenile, there is no allegation, and the record supports no inference, that this conduct was of the same nature as the 1975 behavior involving juveniles. While appellant's criminal conduct bespeaks unusually bad judgment and evinces the requisite moral turpitude under SCR 21.05(1)(1980) to justify discipline, it does not appear to implicate his technical competence as an attorney. There is no evidence that appellant has engaged in moral or legal misconduct of

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13/ "SCR 21.06 Types of discipline. Misconduct is grounds for one or more of the following types of discipline:

"(1) Revocation of license to practice law (disbarment).

"(2) Suspension of license to practice law, including the imposition of conditions upon seeking reinstatement of the license.

"(3) Monetary payment.

"(4) Public, private or informal reprimand.

"(5) Conditions upon the continued practice of law."

any other type or nature since his admission to the bar. While it is unclear from the record whether appellant is penitent in the sense of a revised or reformed personal moral view of his activities, he appears to understand the professional impropriety of his activity and its societal unacceptability.

Criminally and morally culpable and foolish as were appellant's activities, they were not of the same nature or severity as were the prior acts which the bar and this court found were not grounds to prevent his becoming a member of the bar.

We think a suspension of appellant's license for three years will adequately serve the interests to be protected by the attorneys' disciplinary process, and we accordingly modify the revocation imposed by the referee. The three years is deemed to have begun running on August 20, 1980, the date the referee issued his report. See SCR 22.17(2) (1980).

We remain concerned, however, about appellant's character and moral fitness to practice law. It is in this connection that consideration of the 1975 activities is relevant to our disciplinary disposition of the case. We think that, viewed together, the 1975 conduct and the 1979 criminal convictions raise serious questions about appellant's judgment and psychological fitness, which are relevant to the moral qualities an attorney must possess. We therefore order, pursuant to SCR 21.06(2)(1980), that as conditions upon seeking reinstatement, appellant demonstrate both professional and psychiatric evidence of his fitness to practice law in this state. This will involve inquiry by both the Board of Attorneys Professional Responsibility and the Board of

Attorneys Professional Competence, and the report and recommendation of both boards to this court, in accordance with SCR 21.11 (1980), prior to our ruling on such petition for reinstatement. If appellant decides to seek reinstatement, we authorize him, pursuant to SCR 22.28(4)(b) (1980), to file his petition therefor with this court six months prior to the elapsing of his three years' suspension, in order that the indicated investigations may be timely made. We note the relevance of present and future compliance with the terms of SCR's 22.26 and 22.28 (1980) to any petition for reinstatement.

The referee imposed on appellant the costs of the proceeding, not to exceed $1,000, to be paid within one year from August 20, 1980, and as a condition of application for reinstatement. Appellant alleges that this amount includes attorney fees, which, he correctly argues, would be impermissible.[14/] We have undertaken an independent review of the itemized costs, however, and find that they exceed $1,000 exclusive of attorney fees. We therefore uphold the referee's imposition of costs not in excess of $1,000. Appellant's claim that payment of costs, once imposed, may not properly be made a condition of reinstatment, is unsupported by our rules on this matter.[15/]

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14/ Attorney fees are not properly chargeable to the respondent in a disciplinary proceeding. State v. Postorino, 53 Wis. 2d 412, 420, 193 N.W. 2d 1 (1972); State v. Preston, 38 Wis. 2d 582, 588e, 157 N.W. 2d 615 (1968). SCR's 21.12, 22.19 and 22.20 (1980) continue this policy, and are unaffected in this respect by new SCR 22.01(6m), created by order of this court on December 29, 1980, defining "costs" in some detail but not mentioning attorney fees.

15/ Appellant argues that it was ultra vires for the referee to make the payment of costs (pursuant to disbarment under 21.06(1) (1980)) a condition of reinstatement. Since imposition of such costs is authorized by SCR 22.20(1980), however, payment thereof is properly a condition of reinstatement by virtue of SCR's 22.26(4)(a), (7) and 22.28(4)(d) (1980).

The referee further, however, imposed as a condition of reinstatement the proof of payment in full of $2,500 in fines, $250 in a penalty assessment (whose existence is disputed), and $9 in court costs, alleged to have been imposed pursuant to the 1979 Clark County criminal convictions. These are matters bearing on the appellant's relationship to a trial court as a convicted private citizen. That court has the ability satisfactorily to supervise the terms, conditions, and enforcement of its own judgments; and its prerogative to do so to its satisfaction should not be supplanted by the bar or by this court in a disciplinary proceeding. We therefore hold that proof of compliance with the terms (both agreed and disputed) of such judgments was not a proper condition of reinstatement, and vacate the portion of the referee's order relating to the judgment in the underlying criminal prosecution, leaving their resolution to the Circuit Court for Clark County. The trial court's satisfaction, however, that an attorney convicted in its court has complied with the terms and conditions of a judgment may well be relevant to an application for reinstatement, and we do not imply that these matters may not be reviewed from that perspective at such time as application for reinstatement may be made.

It is ordered that appellant's license to practice law in this state is suspended for three years effective August 20, 1980, with conditions on application for reinstatement as stated in this opinion. The referee's imposition of the costs of the instant disciplinary proceeding, not to exceed $1,000, payable within one year from August 20, 1980, and as a condition of application for reinstatement, is affirmed. The referee's order with respect to the underlying criminal conviction is vacated.

Abrahamson, J., took no part.

AUG 20 1980

STATE OF WISCONSIN IN SUPREME COURT

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In the Matter of the Disciplinary Proceedings Against:

STEPHEN RABIDEAU, Attorney at Law

REFEREE'S REPORT AND DISPOSITION

Case No. 80-453D

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The Board of Attorneys Professional Responsibility of the State of Wisconsin on March 10,1980, having filed a Complaint against Stephen Rabideau for unprofessional conduct; and Mr. Rabideau having appeared by Attorney Gene D. Linehan, Wausau, Wisconsin; and issue having been joined by Answer to the Complaint filed on March 10, 1980; and the Supreme Court having appointed the undersigned as Referee on March 13, 1980; and a hearing having been held on July 3, 1980, at the Clark County Courthouse in the City of Neillsville; and the Board being represented by Attorney Roy S. Wilcox, Eau Claire, Wisconsin, and the Respondent being represented in person and by Attorney Gene D. Linehan; and after hearing the testimony and considering the evidence offered at the hearing and being fully advised in the premises, I make the following:

COPY

FINDINGS OF FACT

1. That the Board of Attorneys Professional Responsibility is a body created by the Supreme Court of the State of Wisconsin and existing under Chapter 21 of the Supreme Court Rules.

2. That the Respondent, Stephen Rabideau, is an attorney duly licensed to practice law in the Supreme Court and all courts of the State of Wisconsin since May of 1978 and last resided and maintained his practice in Neillsville, Wisconsin.

3. That on or about the 24th day of August, 1979, Respondent contributed to the delinquency of a minor who had previously been his juvenile client by delivering marijuana to said minor and having the minor smoke said substance in Respondent's presence.

4. That on or about the 21st day of September, 1979, the apartment of Respondent was searched pursuant to a search warrant at which time Respondent was found to possess a controlled substance, tetrahydrocannabinol (THC) as listed in Schedule I of Section 161.14 (4) (t), Wis. Stats.

5. By reason of the aforesaid conduct, Respondent was charged in Circuit Court for Clark County, Wisconsin, by a Complaint dated November 9, 1979, with a violation of Section 947.15 (1) (a), Wis.Stats. That Respondent and his counsel negotiated with the prosecuting attorney to drop other charges under consideration and on the 12th day of November, 1979, upon a plea of guilty, was convicted on both counts, was adjuded guilty on both counts and was sentenced to pay a fine of $2,000.00 on the first count, a fine of $500.00 on the second count, together with a penalty assessment of $250.00 and court costs in the amount of $9.00.

6. That Respondent's conduct as aforesaid represented a violation of a criminal statute involving moral turpitude and as such was misconduct in violation of SCR 21.05.

7. That in 1975 Respondent was served with criminal complaints charging several counts of taking indecent liberties with minors and several counts of sexual perversion with minors; that subsequent thereto the Respondent and the State entered into a stipulation and agreement whereby in the interests of the community and considering

the age of the victims and the background of the Respondent, that prosecution would be deferred pending psychiatric treatment.

8. Counsel for Respondent objected to the admission of any evidence of criminal activity on the part of the Respondent that occurred prior to Respondent's admission to theBar. Objection was overruled and Exhibits #2, #3 and #4 were admitted over a continuing objection of counsel. Exhibit #4 is a Stipulation and Agreement made between the District Attorney of Dane County and the defendant, Stephen D. Rabideau in the cases then pending in Dane County in 1975, wherein defendant agreed to recited conditions in consideration of the State deferring any further prosecution of the pending offenses. Condition 3 provides:

> "3) That both parties agree that at the request of any duly authorized official of the State Bar of Wisconsin or the Wisconsin Supreme Court that the file of the District Attorney's Office, including all of the allegations contained in the above complaints for the above cases would be available to the official of the State Bar or the Supreme Court for their consideration in determining whether the defendant qualifies to practice law in the State of Wisconsin."

9. That in his testimony, Respondent attempted to justify the giving of marijuana to a minor in terms of "attempting to help the boy straighten out". That although Respondent knew his conduct was illegal, he now chooses to excuse his acts based upon his own personal code and upon his interpretation of what constitutes moral turpitude.

That Respondent's conduct and particularly his attempted explanation of such conduct with regard to the Clark County charges, when viewed in the light of his previous criminal misconduct, call for a severe penalty to be imposed for the purpose of protecting the public interest so that there may be assurance of the moral fitness and professional responsibility of everyone licensed to practice law in the State.

DISPOSITION

1. That the license granted to Stephen Rabideau to practice law in this State be revoked effective immediately.

2. That Respondent pay the costs of this proceeding, not to exceed $1,000.00, within one year of the date of this report.

3. That in the future, any application for reinstatement of his right to practice law must be accompanied with proof of payment of the costs herein imposed and proof of payment in full of the fines, penalty and costs imposed in the Clark County criminal cases.

Dated this 20th day of August, 1980.

Rodney Lee Young, Referee

STATE OF WISCONSIN

SUPREME COURT

No. 80-453-D

IN THE MATTER OF THE DISCIPLINARY
PROCEEDINGS AGAINST STEPHEN D. RABIDEAU
ATTORNEY AT LAW

**********

ATTORNEYS BOARD OF PROFESSIONAL RESPONSIBILITY
STATE OF WISCONSIN
Complainant-Respondent,

vs.

STEPHEN D. RABIDEAU
Respondent-Appellant

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

PLEASE TAKE NOTICE HEREBY that Stephen D. Rabideau, Respondent-Appellant herein and Appellant in the Supreme Court of the United States, by this Notice of Appeal takes appeal from the judgment of this Court, embodied in its Opinion herein, rendered and entered on June 2, 1981. This appeal is taken under 28 U.S.C. 1257(2).

Stephen D. Rabideau
9925 Lyndale Ave. So., No. 719
Bloomington, MN. 55420
Pro Se

## Affidavit of Service

State of Minnesota )
County of Hennepin ) ss

Stephen D. Rabideau, being first duly sworn on oath, deposes and says:

1. The sole party required to be served a copy of the above Notice of Appeal has been served in the following manner:

2. Affiant placed a copy of the above Notice of Appeal, as well as Entry of Appearance and Jurisdictional Statement on Appeal in an envelope, sealed it, affixed sufficient first-class postage, and placed thereupon the address of counsel for the Attorneys Board of Professional Responsibility of the State of Wisconsin, Roy S. Wilcox, to wit: 131 South Barstow Street, Eau Claire, Wisconsin 54701

3. Affiant thereupon placed said envelope containing the above Notice of Appeal in a collection box of the United States Postal Service, at Minneapolis, Minnesota on August 27th, 1981.

s/ Stephen D. Rabideau
Stephen D. Rabideau

Subscribed and sworn to before me

this 27 day of August, 1981

s/ [illegible]
Notary Public

CORINNE DICKEY
NOTARY PUBLIC — MINNESOTA
HENNEPIN COUNTY
My Commission Expires Jan. 17, 1983

My commission June 17, 1983

# Appendix

Office-Supreme Court, U.S.
FILED
AUG 31 1981
ALEXANDER L. STEVAS,
CLERK

81-478

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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STEPHEN D. RABIDEAU, Appellant,

vs.

ATTORNEYS BOARD OF PROFESSIONAL RESPONSIBILITY, STATE OF WISCONSIN

Appellee

---

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

---

# APPENDIX TO JURISDICTIONAL STATEMENT

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Stephen D. Rabideau
9925 Lyndale Ave. So., #719
Bloomington, MN. 55420

Aug. 28, 1981 Pro Se

Office-Supreme Court, U.S.
FILED
AUG 31 1981
ALEXANDER L. STEVAS,
CLERK

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NOTICE

This opinion is subject to further editing and modification. The first version will appear in the bound volume of the official reports.

FILED
Jun 2, 1981

CLERK OF SUPREME COURT
MADISON, WISCONSIN

No. 80-453-D

STATE OF WISCONSIN : IN SUPREME COURT

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In the Matter of the

DISCIPLINARY PROCEEDINGS AGAINST

STEPHEN RABIDEAU, ATTORNEY AT LAW

---

APPEAL from a report and disciplinary order of RODNEY L. YOUNG, Referee.

PER CURIAM. This is an appeal from an order of a referee finding, inter

alia, that the respondent-appellant, Attorney Stephen D. Rabideau, was subject to discipline for professional misconduct due to a violation of a criminal statute involving moral turpitude. The referee ordered that appellant's license to practice law be revoked, imposed the costs of the proceeding, and required that proof of payment of such costs (and of certain fines, penalty assessments, and costs of the underlying criminal matter) accompany any future application for reinstatement to the bar. We modify the order by directing, instead of revocation, suspension for three years, subject to conditions of reinstatement discussed later in this opinion, and we sustain the

imposition of costs of the disciplinary proceeding and the requirement that they be paid prior to reinstatement in the bar. We reverse that part of the referee's disposition ordering that payment of fines, penalties, and costs imposed in the criminal prosecution be made a condition of reinstatement.

On January 15, 1980, the Board of Attorneys Professional Responsibility filed a complaint with this court alleging that on November 12, 1979, Attorney Stephen D. Rabideau, upon a plea of guilty, had been convicted in the Circuit Court for Clark County of violating secs. 947.15 (1) (a) (contributing to the delinquency of a minor), and sec. 161.41 (3) (possession of a

controlled substance), Stats., and furthermore had not fully paid the fines and penalties imposed pursuant to his conviction. The complaint alleged that respondent's conduct constituted illegal conduct involving moral turpitude "in violation of DR 1-102(A)(3), a lawyer's disciplinary rule now numbered as SCR 20.04 (3) (1980).[1/] The complaint further stated that certain activities with minors in which the respondent had allegedly engaged in 1975 would be relevant to the appropriate discipline.

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1/ SCR 20.04 (3) (1980) provides:

"SCR 20.04 Misconduct. A lawyer shall not: (3) Engage in illegal conduct involving moral turpitude."

We referred the matter for hearing to the Clerk of Circuit Court for Clark County pursuant to SCR 21.09 (4) (1980), appointing Rodney L. Young of Wausau as referee. Hearing was held on July 3, 1980.

The evidence adduced at hearing shows that Attorney Rabideau graduated from the University of Wisconsin Law School in 1975 and was admitted to the Wisconsin bar in May of 1978. After serving for a few months as Assistant Attorney in the District Attorney's office of Burnett County, he went into practice in Neillsville, Wisconsin, in September 1978.

Rabideau testified that on the evening of August 24, 1979, he was at a

school swimming pool, where he had a chance meeting with a youth whom he had represented in juvenile proceedings the previous fall, as a court-appointed attorney. The youth, aged sixteen, and not at that time Rabideau's client, was a resident of the Sunburst Youth Home. Rabideau testified that the youth asked him for a ride back to Sunburst, permission for which was obtained from a supervising counselor. Rabideau stated that he had recently heard reports of mistreatment at the facility and was concerned about such matters, because he had represented other Sunburst youths, and was concerned about this particular youth's mental and physical well being. He said he hoped to use the car ride as a

means of finding out more information and offering his concerned attention. According to Rabideau, the youth asked if he had any marijuana in the vehicle. Rabideau did; he acceded to the request, and they shared a marijuana cigarette, which he thought "would facilitate [the youth's] receptiveness to my sincere concern."

Testimony and exhibits introduced at the hearing also showed that on September 21, 1979, the Clark County Sheriff's Department searched Rabideau's apartment, with a warrant, and found therein some marijuana, apparently about two-three grams (an amount Rabideau described as "five or six finger pinches"). After plea negotiations, Rabideau pleaded

guilty on November 12, 1980, to charges of contributing to the delinquency of a minor (sec. 947.15 (1) (a), Stats.) and possession of a controlled substance (sec. 161.41 (3)). The court sentenced him to a $2,000 fine on the first count, $500 on the second, and court costs ($9), with sixty days to pay.[2/] A sixty-day extension was sought and granted because of Rabideau's financial inability to meet the deadline; at least some payments

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2/ The Board of Attorneys Professional Responsibility asserts that the court also imposed a $250 penalty assessment. Rabideau disputes this claim. For reasons which will appear, we need not and do not resolve this dispute.

have been made since then.

Additional evidence was adduced at the hearing. Certified copies of files of the Dane County District Attorney and the Dane County Criminal Court were introduced, dating from 1975, indicating that criminal complaints were initiated against Rabideau that year for several episodes of allegedly taking indecent liberties with children. Another exhibit was introduced which showed that the state and Rabideau at that time stipulated that the state would dismiss these charges, without prejudice, if Rabideau agreed to psychiatric treatment and met certain other conditions. According to the terms of the agreement, which apparently were met, the state agreed not

to prosecute at all if the agreement were followed without violation for eighteen months. The other condition relevant to these proceedings provided:

"3) That both parties agree that at the request of any duly authorized official of the State Bar of Wisconsin, or the Wisconsin Supreme Court, that the file of the District Attorney's Office, including all the allegations contained in the above complaints for the above cases would be available to the officials of the State Bar or the Supreme Court for their consideration in determining whether the defendant qualifies to practice law in the State of Wisconsin."

Rabideau was admitted to the bar in May 1978 after a full review of these

matters and their bearing on his fitness to practice law.

Rabideau's attorney objected to the admission of these exhibits at the hearing on the grounds that they were relevant only to his bar admission, not subsequent disciplinary proceedings; that they were "res judicata" as they had been reviewed prior to his bar admission; that their admission violated due process and ex post facto constitutional provisions; and that attorney disciplinary rules are not intended to apply to conduct prior to bar admission. Rabideau testified that he thought the entire matter of the 1975 conduct and criminal proceedings had been resolved at his bar admission proceedings.

Rabideau's criminal conviction for the 1979 charges led him to leave his law practice in Neillsville and move to San Francisco, where at the time of hearing he was doing legal research for other attorneys.

On August 20, 1980, the referee, pursuant to SCR 21.09 (5) (1980), found that the criminal conviction "represented a violation of a criminal statute involving moral turpitude and as such was misconduct in violation of SCR 21.05." He also found that Rabideau's conduct and purported justification therefor, "when viewed in the light of his previous criminal misconduct," called for a severe penalty "for the purpose of protecting the public interest so that there

may be assurance of the moral fitness and professional responsibility of everyone licensed to practice law in the State." He ordered revocation of Rabideau's license and the other conditions described. Rabideau appealed to this court from the referee's report and disposition, pursuant to SCR 22.17 (1980).

Rabideau has apparently not had any disciplinary matters or complaints before the bar other than the present one, and no other criminal convictions.

Appellant Rabideau raises numerous arguments before this court, challenging both certain aspects of the general operation of the disciplinary rules and the specific terms of the referee's findings and order in this case. We

consider these claims seriatim.

The first claim is a challenge to the constitutionality of SCR 21.05 (1) (1980). That rule provides:

"SCR 21.05 Grounds for discipline. An attorney is subject to discipline for misconduct. Misconduct is conduct that violates:

"(1) A criminal statute if the violation involves moral turpitude."

Appellant argues that this rule, pursuant to which the referee found him subject to discipline, provides insufficient notice as to whether or not a particular violation of a criminal statute involves "moral turpitude," and thus that it is void for vagueness, in violation of due process provisions of

the United States and Wisconsin Constitutions.[3] We reject this argument,

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[3] The complaint in this case filed by the Board of Attorneys Professional Responsibility did not invoke this court rule, but instead alleged that petitioner's conduct was illegal conduct involving moral turpitude "in violation of DR 1-102 (A) (3)." That disciplinary rule is now found at SCR 20.04 (3) (1980), which, under the title, "Misconduct," provides that "A lawyer shall not: . . . Engage in illegal conduct involving moral turpitude." For purposes of notice of the disciplinary charges, there is no material difference in this case between the language of SCR 20.04 (3)

as we recently did a similar challenge to the Code of Judicial Ethics, In Matter of Complaint Against Seraphim, 97 Wis. 2d 485, 497-99, 294 N.W. 2d 485 (1980).

The text of SCR 21.05 (1) (1980) shows that a violation of a criminal statute does not ipso facto justify the imposition of discipline; moral turpitude is also required. This is not a new requirement in the history of attorneys' discipline, but merely a recent codification of a longstanding practice observed by this court and others. As we

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(1980) ("illegal conduct involving moral turpitude") and SCR 21.05 (1) (1980) ("A criminal statute if the violation involves moral turpitude.")

stated in State v. Roggensack, 19 Wis. 2d 38, 46, 119 N.W. 2d 412 (1963), "[Not] . . . every violation of law by an attorney will subject him to discipline. As a general rule, before such violation will be a ground for discipline it must entail moral turpitude as defined in State v. McCarthy . . . ." See also State v. Postorino, 53 Wis. 2d 412, 415, 193 N.W. 2d 1 (1972); In re Richter, 187 Wis. 490, 504, 204 N.W. 492 (1925); Note, The Imposition of Disciplinary Measures for the Misconduct of Attorneys, 52 Col. L. Rev. 1039, 1049 (1952).

The case of State v. McCarthy, 255 Wis. 234, 38 N.W. 2d 679 (1949), referred to in Roggensack, supra, sets forth what is meant by "moral turpitude." Therein we said:

"In our society moral standards are derived in large part from Christian teaching and are reflected more or less accurately in what is termed 'public opinion,' which is the consensual judgment of the general public . . . .

" . . . .

"Moral turpitude is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.' [citation omitted]

" . . . .

"'. . . moral turpitude is anything done contrary to justice, honesty, principle or good morals . . . .'

[citation omitted]." Id. at 248-50.

We recognize, as indeed we did in State v. McCarthy, that there is an inherent generality and indefiniteness to the phrase, "moral turpitude." We acknowledged in that case that whether a person's conduct indicates moral turpitude "depends upon the circumstances of each case. The same rule cannot be applied to every case involving a violation of law." Id. at 250.

The generality of the concept, however, renders it neither meaningless nor constitutionally infirm as to adequacy of notice.

In the first place, an attorney who knowingly violates any criminal statute should not be heard to claim insufficient

notice of the general culpability of his conduct, especially in light of the heightened awareness of the law and heightened responsibility to respect it with which an attorney is properly charged. See SCR 20.02(5)(1980); Ex parte Wall, 107 U.S. 265, 274 (1882).4/

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4/ SCR 20.02(5) (1980), Ethical Consideration, provides in part:

"A lawyer should be temperate and dignified and should refrain from all illegal and morally reprehensible conduct. Because of a lawyer's position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially,

respect for the law should be more than a platitude."

Justice Bradley stated in Ex parte Wall, supra, 107 U.S. at 274:

"Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, . . . argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve." (Quoted in Roggensack, supra, 19 Wis. 2d at 45.)

Any lawyer knowingly engaging in criminally proscribed conduct can properly be charged with an awareness of the possible jeopardy in which such activity may place his professional status.

The secondary inquiry--whether the criminal violation involves moral turpitude--involves a rough, but permissible, assessment of the moral character of the particular criminal activity. Not all "turpitudinous" crimes could reasonably be listed; a fixed list would likely, as applied to particular situations, be both over- and underinclusive. Moreover, the differing moral quality of criminal behavior in various situations necessitates a flexible approach to the assessment of discipline-worthy criminal conduct, one not hamstrung by rigid

"laundry lists" of behavior. A responsible attorney should have no cognitive problem recognizing that criminal actions of different sorts may strike a fact-finding tribunal as more or less morally reprehensible, and should be able to tailor his own behavior accordingly.

We are satisfied, in light of these considerations, that SCR 21.05 (1) (1980) is not unconstitutionally vague.

Appellant makes the related argument that "moral turpitude," the second element of SCR 21.05 (1) (1980), is so broad and has been subject to such varying interpretations that it in effect adds nothing to the "violation of a criminal statute" element of the rule; and, hence, disciplinary proceedings

based on a criminal conviction in reality amount to reprosecution and repunishment for the same offense which underlies the disciplinary proceeding, in violation of the Wisconsin constitutional provision against double jeopardy, Wis. Const. art. I, sec. 8. That provision states, in relevant part, that ". . . no person for the same offense shall be put twice in jeopardy of punishment. . . ."

Our response to this allegation is twofold. First, as we have discussed above, the requirement of moral turpitude is a genuine second element which must be additionally found before discipline may be imposed for misconduct under SCR 21.05(1)(1980); thus, the disciplinary proceeding is not based on

"the same" legal charge as the prior, underlying criminal conviction. By analogy to our treatment of lesser-included offenses, the requirement of moral turpitude clearly makes misconduct in violation of SCR 21.05(1)(1980) a different legal entity than the offenses signified by underlying criminal convictions which, as here, contain no statutory element of "moral turpitude." See Randolph v. State, 83 Wis. 2d 630, 266 N.W. 2d 334 (1978); Hagenkord v. State, 100 Wis. 2d 452, 481, ___ N.W. 2d ___ (1981). Identification of this different "element" renders a violation of SCR 21.05(1)(1980) different from the underlying criminal convictions irrespective of "the peculiar facts of a

given case." Randolph, supra, 83 Wis. 2d at 642.

More important, however, is the difference between an attorney disciplinary proceeding, which is not a charge of a criminal offense, and a criminal conviction. Disciplinary proceedings are civil in nature. Matter of Proceedings Against Sedor, 73 Wis. 2d 629, 636, 245 N.W. 2d 895 (1976); State v. Postorino, 53 Wis. 2d 412, 417, 193 N.W. 2d 1 (1972). Disciplinary proceedings do not constitute a second "trial," nor is the sanction which may be imposed a secondary penalty or punishment. Rather, the primary purpose of a disciplinary proceeding is the ascertainment of moral fitness and professional competency of the attorney,

and a determination of whether it is necessary for the protection of the public interest that the attorney be disciplined, suspended, or disbarred. State v. Corry, 51 Wis. 2d 124, 186 N.W. 2d 325 (1971); SCR 21.03(5)(1980).[5] These are public interests not addressed by the underlying criminal proceeding.

Whatever ancillary punitive effects

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5/ This rule provides:

"SCR 21.03 General principles.

". . . .

"(5) Discipline for misconduct is not intended as punishment for wrong-doing but is for the protection of the public, the courts and the legal profession . . . ."

might be said to attach in a practical sense to an attorney's civil disciplinary proceeding do not violate the state constitutional proscription against being put twice in jeopardy of "punishment" for the same "offense."

Appellant also argues that his criminal violations did not, under the circumstances, involve moral turpitude, and thus discipline is unwarranted under SCR 21.05(1)(1980). The claim that no moral turpitude was evinced rests on several factors.

The first is that the illegal activity did not occur in appellant's professional capacity as an attorney. The record appears to support this claim

as a factual matter.[6] This does not,

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6/ Nothing in the record ties the conviction for possession of a controlled substance, sec. 161.41 (3), Stats., to any activity by the petitioner as an attorney. We accept that the same is true with respect to the charge of contributing to the delinquency of a minor, sec. 947.15(1)(a), Stats. We note, however, as to the latter conviction, that although the youth was not a client of petitioner's at the time of the criminal activity, he had been one within the preceding year, and that petitioner's rationale for sharing marijuana with him was concern for both the youth's welfare and that of the residents of the Sunburst Youth

however, ipso facto immunize an attorney from discipline. Some of our earlier cases appear to have attempted to draw a bright line between professional and nonprofessional activity. This approach was expressly overruled in State v.

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Home, some of whom had also been clients of petitioner. Although we do not base our disposition of this matter on a view that petitioner was acting within a lawyer-client relationship at the time of his transgression, we think the factual background suggests his activities were closer to being in the course of his legal representation than petitioner describes.

Roggensack, 19 Wis. 2d 38, 48, 119 N.W. 2d 412 (1963). More recently we stated, where an attorney had been convicted of commercial gambling and was before this court on a disciplinary hearing:

"While his conduct is not unprofessional in the strict sense of the word because it did not relate to an activity in a professional capacity, nevertheless, the concept of unprofessional conduct now embraces a broader scope and includes conduct outside the narrow confines of a strictly professional relationship that an attorney has with the court, with another attorney or a client. There are many activities in the minds of the public which a professional man should

not undertake because he is a professional man of trust and much is expected of him. A lawyer is a professional man twenty-four hours a day, not eight hours, five days a week." State v. Postorino, supra, 53 Wis. 2d at 419.7/

7/ Ethical consideration (5) of SCR 20.02 (1980) provides that a lawyer should "refrain from all illegal and morally reprehensible conduct. Because of a lawyer's position in society, even minor violations of a law by a lawyer may tend to lessen public confidence in the legal profession." Although this is not a mandatory provision independently providing grounds for discipline, in enforcing SCR 20.05 (1) (1980), we are authorized by SCR 20.002 (1980) to rely on it "for

The fact that appellant was not acting in the professional capacity of an attorney when he violated the criminal law of the state does not defeat the imposition of discipline.

Appellant also argues that there was no moral turpitude here because the prevailing moral sentiment no longer condemns the possession and use of small amounts of marijuana. In light of the continued legislative treatment of marijuana as a Schedule I controlled substance (sec. 161.14(4)(k), Stats.),

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interpretive guidance in the basic principles embodied in the canons and in the objectives reflected in the ethical considerations."

this claim cannot be sustained. Moreover, this legislative policy judgment distinguishes the offense from one involving alcohol, which appellant proffers as being similar. Whatever may have been appellant's personal preferences and motivations in possessing and sharing marijuana, we cannot, in light of the expressed public policy of the state, hold that his conduct comports with prevailing moral sentiment.

More fundamentally, appellant was convicted not merely of use or possession, but of contributing to the delinquency of a child in violation of sec. 947.15 (1)(a), Stats.[8/] This is not a

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8/ Section 947.15(1)(a), Stats., provides:

"victimless" crime; the statute criminalizing this behavior plainly contemplates that one who engages in such conduct threatens the welfare of a person of tender years. Whether, as appellant argues, the youth herein requested the marijuana, prompting appellant to supply it as "the result of sudden impulse and unexpected provocation resulting in thoughtless commission of

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"(1) The following persons are guilty of a Class A misdemeanor . . . :

"(a) Any person 18 or older who intentionally encourages or contributes to the delinquency of any child as defined in s. 48.02(3m) or the neglect of any child . . . ."

the violation without serious thought of the consequences," is not the point. Section 947.15 (1)(a), Stats., prohibits "contributing" to a minor's delinquent behavior just as clearly as it prohibits "encouraging" it. An adult, under the statute, has a duty to refrain from such activity as appellant engaged in. There is clearly a moral aspect to this behavior, and under the circumstances it may be characterized as turpitudinous.9/

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9/ We note, in addition, that the marijuana was shared while petitioner was driving the youth back to a youth home. We think that this adds another element of moral irresponsibility--the danger, to passengers and other drivers, of driving under the influence,

just as in the case of driving under the influence of alcohol. Petitioner cites to us, as authority for the benign effects and quality of marijuana, L. Young, et al., Recreational Drugs (1979). While we intimate no position on such matters, we quote from the chapter on marijuana, which otherwise extols the benefits and pleasures of recreational use of the drug:

"It seems safe to recommend that an inexperienced pot user should not drive, or at least should abstain from driving until he gets used to the drug's effects. There is no doubt that marijuana alters perceptions and reflexes,

We have noted that, at the disciplinary hearing, the Board of Attorneys Professional Responsibility introduced, over the objections by the appellant, documents stemming from criminal charges filed against him in Dane County in 1975

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and both are needed to drive safely. Some claim that experienced drivers can, however, call upon their compensation factor and drive confidently, without noticeable impairment. But, your best bet is to avoid all intoxicants, if possible, when getting behind the wheel. If the thought of driving stoned makes you feel uncomfortable, listen to your head and give the car keys to a friend." Id. at 140.

relating to several episodes of allegedly taking indecent liberties with children. These matters were reviewed by the bar and this court upon appellant's application and admission to the bar in May of 1978, and did not preclude his admission. Appellant now argues, for numerous reasons, that their consideration in the instant disciplinary proceeding is improper. The central thread in all these arguments is that conduct prior to bar admission, once admission has been granted, cannot properly be taken into account in a disciplinary proceeding for misconduct alleged to have occurred after admission.

At the outset, we observe that the Board's complaint, and the referee's

findings, were careful to limit consideration of these 1975 charges to the proper discipline to be imposed, rather than as substantive evidence of appellant's present wrongdoing as an attorney. Thus appellant's first objection--that, under SCR 21.05(1)(1980), pre-bar admission conduct cannot be the "subject" of disciplinary proceedings for attorney misconduct--does not accurately describe the purposes for which the 1975 records were admitted and considered. We note, moreover, that evidentiary rules of relevance applicable to criminal proof of guilt, or establishment of civil liability, in normal litigation, are not in any event entirely applicable to the attorney disciplinary process. Prior

conduct occurring before bar admission may be relevant to the choice of discipline, and even to questions of character, which might be inappropriate to consider in other proceedings given the different nature and purposes of disciplining an attorney.

Appellant argues that admission and consideration of his 1975 encounters with the criminal law constitute an ex post facto application of SCR 21.05(1)(1980), in violation of Wis. Const. art. I, sec. 12, and United States Const. art. I, sec. 10, cl. 1.[10] As we have recently held, however, there is no ex post facto

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10/ "Section 10. No state shall . . . pass any bill of attainder, ex post facto law . . . ."

prohibition except in criminal proceedings or matters where penalty or punishment is imposed. See In Matter of Guardianship of Nelson, 98 Wis. 2d 260, 272-74, 296 N.W. 2d 736 (1980); see also In Matter of Complaint Against Seraphim, 97 Wis. 2d 485, 493-95, 294 N.W. 2d 485 (1980). We pointed out earlier that attorney disciplinary proceedings are neither criminal nor punitive, but instead aimed at regulating the profession and protecting the public. Moreover, the 1975 criminal charges in this case are not, standing alone, any sort of basis for the present disciplinary proceedings; absent the post-bar admission convictions, this action would never have been initiated.

Appellant further argues that since this court once ruled that an attorney's good behavior, prior to bar admission, would not be considered in mitigation of a subsequent disciplinary proceeding,[11] notions of equal protection are violated by consideration, during disciplinary proceedings, of bad behavior occurring prior to bar admission. This rather generalized contention ignores the rational basis which supports the differing permissible use of prior conduct evidence--the profession is properly concerned about the moral character of its members, as to which patterns of

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11/ State v. Cannon, 199 Wis. 401, 226 N.W. 385 (1929).

misconduct, regardless of when they occur, may become relevant to tailoring disciplinary measures; whereas good behavior prior to bar admission is no guarantee of later propriety, nor does it diminish the severity of a transgression occurring after admission.

Appellant also argues that the 1975 matters are "res judicata" and may not be reviewed again because they were considered upon his application to the bar and were found not sufficiently flagrant to prohibit his admission in 1978. We reject any implication that the Board of Attorneys Professional Responsibility or this court, by virtue of having once evaluated an attorney's or bar applicant's conduct with an eye to

his character and fitness to practice law, loses its authority to review that behavior again upon, and in light of, subsequent misconduct. Nor are we precluded from considering the 1975 matters by the terms of the stipulation entered on January 22, 1976, between appellant and the district attorney for Dane County. That agreement stated that the district attorney's files would be available to the State Bar or this court "for their consideration in determining whether the defendant qualifies to practice law in the State of Wisconsin."[12/]

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12/ The agreement, entered on January 22, 1976, by its terms "expired" eighteen months later, or July 22, 1977. Petitioner argues that it therefore

Petitioner argues that this language was intended and understood to apply only to bar admission and thus cannot support consideration of the 1975 matters now; the Board contends that the language, "qualifies to practice," applies generally, without any such limitation, and thus authorizes consideration of these matters in the present proceeding.

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cannot now be considered. This "expiration date," however, appears to refer to the time after which the district attorney agreed he would not press criminal charges. Thus it does not bar subsequent consideration of the documents for professional disciplinary purposes.

We need not decide which view characterizes the intent of the parties to the agreement. The authority of the bar and this court to consider matters pertaining to the qualification to practice law cannot be "waived" or determined by other parties. Moreover, once considered in the initial determination of bar eligibility, the "cognizance" of the bar and this court over such matters is not lost by the mere fact of admission. If relevant to the question of initial eligibility, such matters may well be relevant to later disciplinary proceedings, due to the bar's continuing interest in the qualifications of its members; the authority to consider such matters is a continuing one.

Appellant next argues that the revocation of his license to practice law, as ordered by the referee, is too harsh a discipline under the circumstances presented in this case, and that a private reprimand is all that is appropriate.[13] While we do not accept

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13/ "SCR 21.06 Types of discipline. Misconduct is grounds for one or more of the following types of discipline:

"(1) Revocation of license to practice law (disbarment).

"(2) Suspension of license to practice law, including the imposition of conditions upon seeking reinstatement of the license.

"(3) Monetary payment.

"(4) Public, private or informal

the idea that a reprimand would be sufficient, we agree that revocation of appellant's license is an inappropriate disciplinary sanction.

The bar, and this court, accepted appellant in 1978 as fit for the practice of law despite his prior misconduct in 1975. Although one of the two 1979 criminal convictions which prompted the present disciplinary proceeding involved a juvenile, there is no allegation, and the record supports no inference, that this conduct was of the same nature as the 1975 behavior involving juveniles.

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reprimand.

"(5) Conditions upon the continued practice of law."

While appellant's criminal conduct bespeaks unusually bad judgment and evinces the requisite moral turpitude under SCR 21.05(1)(1980) to justify discipline, it does not appear to implicate his technical competence as an attorney. There is no evidence that appellant has engaged in moral or legal misconduct of any other type or nature since his admission to the bar. While it is unclear from the record whether appellant is penitent in the sense of a revised or reformed personal moral view of his activities, he appears to understand the professional impropriety of his activity and its societal unacceptability.

Criminally and morally culpable and foolish as were appellant's activities,

they were not of the same nature or severity as were the prior acts which the bar and this court found were not grounds to prevent his becoming a member of the bar.

We think a suspension of appellant's license for three years will adequately serve the interests to be protected by the attorneys' disciplinary process, and we accordingly modify the revocation imposed by the referee. The three years is deemed to have begun running on August 20, 1980, the date the referee issued his report. See SCR 22.17 (2) (1980).

We remain concerned, however, about appellant's character and moral fitness to practice law. It is in this

connection that consideration of the 1975 activities is relevant to our disciplinary disposition of the case. We think that, viewed together, the 1975 conduct and the 1979 criminal convictions raise serious questions about appellant's judgment and psychological fitness, which are relevant to the moral qualities an attorney must possess. We therefore order, pursuant to SCR 21.06(2)(1980), that as conditions upon seeking reinstatement, appellant demonstrate both professional and psychiatric evidence of his fitness to practice law in this state. This will involve inquiry by both the Board of Attorneys Professional Responsibility and the Board of Attorneys Professional Competence, and the report

and recommendation of both boards to this court, in accordance with SCR 21.11 (1980), prior to our ruling on such petition for reinstatement. If appellant decides to seek reinstatement, we authorize him, pursuant to SCR 22.28 (4)(b) (1980), to file his petition therefor with this court six months prior to the elapsing of his three years' suspension, in order that the indicated investigations may be timely made. We note the relevance of present and future compliance with the terms of SCR's 22.26 and 22.28 (1980) to any petition for reinstatement.

The referee imposed on appellant the costs of the proceeding, not to exceed $1,000, to be paid within one year from

August 20, 1980, and as a condition of application for reinstatement. Appellant alleges that this amount includes attorney fees, which, he correctly argues, would be impermissible.[14] We have undertaken

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14/ Attorney fees are not properly chargeable to the respondent in a disciplinary proceeding. State v. Postorino, 53 Wis. 2d 412, 420, 193 N.W. 2d 1(1972); State v. Preston, 38 Wis. 2d 582, 588e, 157 N.W. 2d 615 (1968). SCR's 21.12, 22.19 and 22.20 (1980) continue this policy, and are unaffected in this respect by new SCR 22.01(6m), created by order of this court on December 29, 1980, defining "costs" in some detail but not mentioning attorney fees.

an independent review of the itemized costs, however, and find that they exceed $1,000 exclusive of attorney fees. We therefore uphold the referee's imposition of costs not in excess of $1,000. Appellant's claim that payment of costs, once imposed, may not properly be made a condition of reinstatement, is unsupported by our rules on this matter.[15]

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15/ Appellant argues that it was ultra vires for the referee to make the payment of costs (pursuant to disbarment under 21.06(1) (1980)) a condition of reinstatement. Since imposition of such costs is authorized by SCR 22.20(1980), however, payment thereof is properly a condition of reinstatement by virtue of SCR's

The referee further, however, imposed as a condition of reinstatement the proof of payment in full of $2,500 in fines, $250 in a penalty assessment (whose existence is disputed), and $9 in court costs, alleged to have been imposed pursuant to the 1979 Clark County criminal convictions. These are matters bearing on the appellant's relationship to a trial court as a convicted private citizen. That court has the ability satisfactorily to supervise the terms, conditions, and enforcement of its own judgments; and its prerogative to do so to its satisfaction should not be supplanted by the bar or by this court in a

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22.26(4)(a), (7) and 22.28(4)(d) (1980).

disciplinary proceeding. We therefore hold that proof of compliance with the terms (both agreed and disputed) of such judgments was not a proper condition of reinstatement, and vacate the portion of the referee's order relating to the judgment in the underlying criminal prosecution, leaving their resolution to the Circuit Court for Clark County. The trial court's satisfaction, however, that an attorney convicted in its court has complied with the terms and conditions of a judgment may well be relevant to an application for reinstatement, and we do not imply that these matters may not be reviewed from that perspective at such time as application for reinstatement may be made.

It is ordered that appellant's license to practice law in this state is suspended for three years effective August 20, 1980, with conditions on application for reinstatement as stated in this opinion. The referee's imposition of the costs of the instant disciplinary proceeding, not to exceed $1,000, payable within one year from August 20, 1980, and as a condition of application for reinstatement, is affirmed. The referee's order with respect to the underlying criminal conviction is vacated.

Abrahamson, J., took no part.

Aug 20, 1980

| STATE OF WISCONSIN | IN SUPREME COURT |
|---|---|
| In the Matter of the Disciplinary Proceedings Against: STEPHEN RABIDEAU, Attorney at Law | REFEREE'S REPORT AND DISPOSITION Case No. 80-453D |

The Board of Attorneys Professional Responsibility of the State of Wisconsin on March 10, 1980, having filed a Complaint against Stephen Rabideau for unprofessional conduct; and Mr. Rabideau having appeared by Attorney Gene D. Linehan, Wausau, Wisconsin; and issue having been joined by Answer to the Complaint filed on March 10, 1980; and the Supreme Court having appointed the undersigned as Referee on March 13, 1980;

and a hearing having been held on July 3, 1980, at the Clark County Courthouse in the City of Neillsville; and the Board being represented by Attorney Roy S. Wilcox, Eau Claire, Wisconsin, and the Respondent being represented in person and by Attorney Gene D. Linehan; and after hearing the testimony and considering the evidence offered at the hearing and being fully advised in the premises, I make the following:

FINDINGS OF FACT

1. That the Board of Attorneys Professional Responsibility is a body created by the Supreme Court of the State of Wisconsin and existing under Chapter 21 of the Supreme Court Rules.

2. That the Respondent, Stephen

Rabideau, is an attorney duly licensed to practice law in the Supreme Court and all courts of the State of Wisconsin since May of 1978 and last resided and maintained his practice in Neillsville, Wisconsin.

3. That on or about the 24th day of August, 1979, Respondent contributed to the delinquency of a minor who had previously been his juvenile client by delivering marijuana to said minor and having the minor smoke said substance in Respondent's presence.

4. That on or about the 21st day of September, 1979, the apartment of Respondent was searched pursuant to a search warrant at which time Respondent was found to possess a controlled

substance, tetrahydrocannabinol (THC) as listed in Schedule I of Section 161.14 (4) (t), Wis. Stats.

5. By reason of the aforesaid conduct, Respondent was charged in Circuit Court for Clark County, Wisconsin, by a Complaint dated November 9, 1979, with a violation of Section 947.15 (1) (a), Wis. Stats. That Respondent and his counsel negotiated with the prosecuting attorney to drop other charges under consideration and on the 12th day of November, 1979, upon a plea of guilty, was convicted on both counts, was ajudged guilty on both counts and was sentenced to pay a fine of $2,000.00 on the first count, a fine of $500.00 on the second count, together with a penalty assessment

of $250.00 and court costs in the amount of $9.00.

6. That Respondent's conduct as aforesaid represented a violation of a criminal statute involving moral turpitude and as such was misconduct in violation of SCR 21.05.

7. That in 1975 Respondent was served with criminal complaints charging several counts of taking indecent liberties with minors and several counts of sexual perversion with minors; that subsequent thereto the Respondent and the State entered into a stipulation and agreement whereby in the interests of the community and considering the age of the victims and the background of the Respondent, that prosecution would be

deferred pending psychiatric treatment.

8. Counsel for Respondent objected to the admission of any evidence of criminal activity on the part of the Respondent that occurred prior to Respondent's admission to the Bar. Objection was overruled and Exhibits #2, #3 and #4 were admitted over a continuing objection of counsel. Exhibit #4 is a Stipulation and Agreement made between the District Attorney of Dane County and the defendant, Stephen D. Rabideau in the cases then pending in Dane County in 1975, wherein defendant agreed to recited conditions in consideration of the State deferring any further prosecution of the pending offenses. Condition 3 provides:

"3) That both parties agree that at the request of any duly authorized official of the State Bar of Wisconsin or the Wisconsin Supreme Court that the file of the District Attorney's Office, including all of the allegations contained in the above complaints for the above cases would be available to the official of the State Bar or the Supreme Court for their consideration in determining whether the defendant qualifies to practice law in the State of Wisconsin."

9. That in his testimony, Respondent attempted to justify the giving of marijuana to a minor in terms of "attempting

to help the boy straighten out." That although Respondent knew his conduct was illegal, he now chooses to excuse his acts based upon his own personal code and upon his interpretation of what constitutes moral turpitude. That Respondent's conduct and particularly his attempted explanation of such conduct with regard to the Clark County charges, when viewed in the light of his previous criminal misconduct, call for a severe penalty to be imposed for the purpose of protecting the public interest so that there may be assurance of the moral fitness and professional responsibility of everyone licensed to practice law in the State.

DISPOSITION

1. That the license granted to Stephen Rabideau to practice law in this State be revoked effective immediately.

2. That Respondent pay the costs of this proceeding, not to exceed $1,000.00, within one year of the date of this report.

3. That in the future, any application for reinstatement of his right to practice law must be accompanied with proof of payment of the costs herein imposed and proof of payment in full of the fines, penalty and costs imposed in the Clark County Criminal cases.

Dated this 20th day of August, 1980.

Rodney Lee Young, Referee

Filed: August 28, 1981

Clerk of Supreme Court, Madison, Wisconsin

STATE OF WISCONSIN

SUPREME COURT

No. 80-453-D

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST STEPHEN D. RABIDEAU

ATTORNEY AT LAW

**********

ATTORNEYS BOARD OF PROFESSIONAL RESPONSIBILITY, STATE OF WISCONSIN

Complainant-Respondent,

vs.

STEPHEN D. RABIDEAU

Respondent-Appellant

---

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

---

PLEASE TAKE NOTICE HEREBY that Stephen D. Rabideau, Respondent-Appellant herein and Appellant in the Supreme Court of the United States, by this Notice of Appeal takes appeal from the judgment of this Court, embodied in its Opinion herein, rendered and entered on June 2, 1981. This appeal is taken under 28 U.S.C. 1257(2).

Stephen D. Rabideau
9925 Lyndale Ave. So., #719
Bloomington, MN. 55420
Pro Se

# Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
OCT 19 1981
ALEXANDER L. STEVAS,
CLERK

Case No. 81-478

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1981

STEPHEN D. RABIDEAU,
*Appellant,*

*vs.*

ATTORNEYS BOARD OF PROFESSIONAL RESPONSIBILITY, STATE OF WISCONSIN,
*Appellee.*

On Appeal From the
Supreme Court of Wisconsin

## MOTION TO DISMISS OR AFFIRM

BRONSON C. LA FOLLETTE
*Attorney General*

LE ROY L. DALTON
*Assistant Attorney General*

*Counsel for Attorneys Board of Professional Responsibility, State of Wisconsin*

Post Office Box 7857
Madison, Wisconsin 53707
(608) 266-3863

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Case No. 81-478

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1981

STEPHEN D. RABIDEAU,
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ATTORNEYS BOARD OF PROFESSIONAL RESPONSIBILITY, STATE OF WISCONSIN,
*Appellee.*

On Appeal From the
Supreme Court of Wisconsin

## MOTION TO DISMISS OR AFFIRM

## QUESTION PRESENTED

**Is Wisconsin Supreme Court Rule SCR 21.05(1), which provides that misconduct is conduct that violates a criminal statute if the violation involves moral turpitude, constitutionally vague under the due process clause of the fourteenth amendment?**

## STATEMENT OF THE CASE

**Appellant, who was admitted to practice law in the State of Wisconsin in 1978, appeals from a Wisconsin Supreme Court decision and order imposing discipline**

under Wisconsin Supreme Court Rule (hereafter "SCR") 21.05(1), which reads as follows:

> SCR 21.05 Grounds for discipline. An attorney is subject to discipline for misconduct. Misconduct is conduct that violates:
>
> (1) A criminal statute if the violation involves moral turpitude.

Appellant was convicted upon a plea of guilty in the Circuit Court for Clark County, Wisconsin, on November 12, 1979, for violating two Wisconsin criminal statutes, sec. 947.15(1)(a), Stats., for contributing to the delinquency of a minor, a felony, and sec. 161.41(3), Stats., for possession of a controlled substance, a misdemeanor. Both of these criminal charges resulted from the sharing by appellant of a marijuana cigarette with a minor aged sixteen years.

The Wisconsin Attorneys Board of Professional Responsibility filed a complaint charging appellant with misconduct on March 10, 1980. A hearing was held on July 3, 1980, where the appellant was represented by an attorney of his own choosing (A-59, 60). On August 20, 1980, the referee appointed by the Wisconsin Supreme Court to conduct the hearing filed his report and recommended revocation of appellant's license immediately (A-67).

Appellant appealed from the report and disciplinary recommendations of the referee to the Supreme Court of Wisconsin. On June 2, 1981, the Wisconsin Supreme Court modified the referee's order by directing, instead of revocation, suspension for three years subject to certain conditions for reinstatement (A-2).

Notice of appeal was filed with the Wisconsin Supreme Court on August 28, 1981.

The jurisdiction of this court is invoked under 28 U.S.C. sec. 1257(2), in that the judgment of the Wisconsin Supreme Court upheld the validity of SCR 21.05 (1), against appellant's contention that the rule is vague in the use of the term "moral turpitude" and therefore violates the due process clause of the Fourteenth Amendment to the United States Constitution.

## MOTION TO DISMISS

### I. The Court Should Dismiss Because The Jurisdictional Statement Does Not Comply With Rule 15.1(e) And (h).

The appellant has the responsibility, as set out in Rule 15.1(e), to present in the jurisdictional statement grounds upon which it is contended that federal jurisdiction rests and cases believed to sustain jurisdiction. Rule 15.1(h) requires a statement of reasons why the questions presented are considered to be so substantial as to require plenary consideration. Appellant has failed to comply with those requirements.

Appellant says the phrase "moral turpitude" is unconstitutionally vague and that vagueness violates due process which must be accorded in administrative licensing matters. *Board of Regents v. Roth*, 408 U.S. 564 (1972), is cited as authority for the overall constitutional attack upon the Wisconsin regulations. No cases from this Court are cited which deal with the doctrine of vagueness. The argument seems to be that many courts around the country still support the use of the term "moral turpitude" as not being vague and therefore, this court should order plenary consideration and specifically declare that the term "moral turpitude" cannot be used in connection with licensing matters.

Rule 15.1(e) and (h) require the appellant to thoroughly discuss the federal questions and show the substantiality of the issues with proper case citations. This appellant has failed to do. The vagueness doctrine which is invoked by appellant is not discussed in the jurisdictional statement.

It seems apparent therefore that the appellant has failed to comply with Rule 15.1(e) and (h), in that there is a failure to show that the federal questions are substantial and failure to show that the rulings of the Wisconsin Supreme Court were such as to bring the case within the jurisdictional provisions relied upon.

## II. The Court Should Dismiss The Appeal Because It Does Not Present A Substantial Federal Question.

The question before this court is whether it violates federal due process rights to discipline an attorney for conviction of a criminal statute which involves "moral turpitude." Appellant contends that the term "moral turpitude" is so vague as to deny him adequate notice under the due process clause that conviction of the crimes of contributing to the delinquency of a minor and possession of a controlled substance could result in his loss of his license to practice law.

This Court has given adequate guidance in regard to the vagueness doctrine in *Arnett v. Kennedy*, 416 U.S. 134 (1974). There, a three-judge district court had declared the Lloyd-La Follette Act to be unconstitutionally vague. It provided for the removal of employes "only for such cause as will promote the efficiency of the service." This Court held the Act not unconstitutionally vague. In discussing the vagueness

doctrine, this Court quoted from *Colten v. Kentucky*, 407 U.S. 104 (1972):

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

416 U.S. at 159-60.

The court recognized the almost physical impossibility of spelling out in detail every possible instance of prohibited conduct because of the inherent limitations of the English language when trying to be both specific and manageably brief. The court quoted from *Meehan v. Macy*, 392 F.2d 822, 835, *modified*, 425 F.2d 469, *affirmed en banc*, 425 F.2d 472 (D.C. Cir. 1968):

> [I]t is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees include "catchall" clauses prohibiting employee "misconduct," "immorality," or "conduct unbecoming."

416 U.S. at 161.

This Court considered the application of the term "moral turpitude" in *Jordan v. DeGeorge*, 341 U.S. 223 (1951). It was held therein that conviction on two counts of conspiring to defraud the Government of taxes on distilled spirits was conviction of crime involving "moral turpitude." At 341 U.S. at 227, this Court said:

> The term "moral turpitude" has deep roots in the law. The presence of moral turpitude has been used as a test in a variety of situations, including legislation governing the disbarment of attorneys and the revocation of medical licenses. Moral turpitude also has found judicial employment as a criterion in disqualifying and impeaching witnesses, in determining the measure of contribution between joint tort-feasors, and in deciding whether certain language is slanderous.

At 341 U.S. at 229, this Court said:

> But it has been suggested that the phrase "crime involving moral turpitude" lacks sufficiently definite standards to justify this deportation proceeding and that the statute before us is therefore unconstitutional for vagueness. Under this view, no crime, however grave, could be regarded as falling within the meaning of the term "moral turpitude." The question of vagueness was not raised by the parties nor argued before this Court.
>
> It is significant that the phrase has been part of the immigration laws for more than sixty years. As discussed above, the phrase "crime involving moral turpitude" has also been used for many years as a criterion in a variety of other statutes. No case has been decided holding that the phrase is vague, nor are we able to find any trace of judicial expression which hints that the phrase is so meaningless as to a deprivation of due process.

The Court then went on to cite a case where it construed the phrase "crime involving moral turpitude" in *United States ex rel. Volpe v. Smith*, 289 U.S. 422 (1933). There the question was whether the

crime of counterfeiting involved moral turpitude. This Court said that the crime was "plainly a crime involving moral turpitude."

Many years before the *Jordan* case this Court decided *Ex Parte Wall,* 110 U.S. 434 (1883). There the Court ordered Wall, an attorney of the United States District Court for the Southern District of Florida, to show cause why his license to practice in that court should not be revoked because of Wall's participation in a lynching. That conduct violated the criminal statutes of Florida but Wall was not indicted or convicted of any criminal offense. However, the rules of court provided that an attorney could be struck from the roll "for all such crimes and misdemeanors as affect his moral character." In this Court it was contended that there ought always to be a previous conviction before the courts could strike an attorney from the rolls for the commission of crimes or misdemeanors as affect his moral character. This court rejected that contention and held that if the federal court gave the accused attorney a hearing, it could strike his name from the rolls where the evidence showed his conduct was such as would support a criminal conviction despite the fact that he had not been charged and convicted of the crime.

As we have already pointed out, the vagueness test is based on the question whether the language conveys sufficient definite warning as to the proscribed conduct when measured by common understanding and practices. Here, the appellant, an attorney, had sufficient warning as to the proscribed conduct and there is no substantial federal question presented. Where the federal question determined by the state court is not a substantial one this Court is without jurisdiction of the cause. *Honeyman v. Hanan,* 300 U.S. 14, *appeal dismissed,* 302 U.S. 375 (1937).

The appeal should be dismissed because it does not present a substantial federal question.

## MOTION TO AFFIRM

### The Court Should Affirm The Judgment Because It Is Manifest That The Question Raised Herein Is So Unsubstantial As Not To Need Further Argument.

Under Rule 16.1(c), the court will receive a motion to affirm the judgment sought to be reviewed where the question is so unsubstantial as not to need further argument.

The sole question brought to this Court by the appellant is whether the term "moral turpitude" provides sufficient warning or notice under the due process clause that the appellant herein would know that crimes, of which he has been convicted, would result in discipline concerning his license to practice law. SCR 21.05, provides that an attorney is subject to discipline for misconduct and, among other things, misconduct is defined as conduct which violates "a criminal statute if the violation involve moral turpitude."

Examining that rule we learn that in order to be subject to discipline, that is, possible revocation of license, suspension of license, monetary payment, reprimand, or the impositions of conditions upon continued practice of law in accordance with SCR 21.06, a licensed attorney must have first violated a criminal statute. Here, the record is clear that the appellant violated two Wisconsin criminal statutes and was convicted. As the Wisconsin Supreme Court pointed out:

> In the first place, an attorney who knowingly violates *any* criminal statute,

> should not be heard to claim insufficient notice of the general culpability of his conduct, especially in light of the heightened awareness of the law and heightened responsibility to respect it with which an attorney is properly charged. *See* SCR 20.02(5) (1980); *Ex Parte Wall,* 107 U.S. 265, 274 (1882). Any lawyer knowingly engaging in criminally proscribed conduct can properly be charged with an awareness of the possible jeopardy in which such activity may place his professional status.

(A-7, 8.)

In *Barsky v. Board of Regents of New York,* 347 U.S. 442 (1954), this Court held that a state statute which authorized disciplinary action against a physician on the grounds that he "has been convicted in a court of competent jurisdiction, either within or without the state, of a crime" is not unconstitutionally vague. Under the *Barsky* ruling therefore, the Wisconsin regulation could define misconduct as conduct that violates a criminal statute and such regulation would pass due process muster. However, an attorney in Wisconsin is protected from discipline if convicted of a criminal violation by the further requirement that the violation must involve "moral turpitude" before discipline can be imposed. Certainly there is no constitutional significance to a further requirement that discipline can be invoked only where the crime inolves moral turpitude. Therefore, whether the State of Wisconsin considers the criminal convictions for which appellant is being disciplined to be crimes involving moral turpitude is not a matter of federal constitutional concern.

Accordingly, the Court should affirm the judgment of the Wisconsin Supreme Court on the ground that it

is manifest that the question presented herein is so unsubstantial as not to need further argument.

## CONCLUSION

For the reasons cited above, the Court should either dismiss the appeal on the ground that the appeal was not taken in conformity with Rule 15.1(e), that the appeal does not present a substantial federal question or the Court should affirm the judgment on the ground that it is manifest that the question presented is so unsubstantial as not to need further argument.

Respectfully submitted,

BRONSON C. LA FOLLETTE
*Attorney General*

LE ROY L. DALTON
*Assistant Attorney General*

*Counsel for Attorneys Board of Professional Responsibility, State of Wisconsin*

Post Office Box 7857
Madison, Wisconsin 53707
(608) 266-3863

## CERTIFICATE OF SERVICE

I, LeRoy L. Dalton, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 15th day of October, 1981, three copies of appellees' Motion to Dismiss or Affirm were mailed, postage prepaid, to:

Stephen D. Rabideau
9925 Lyndale Avenue, So., #719
Bloomington, MN 55420

I further certify that all parties required to be served have been served.

---

LE ROY L. DALTON
*Assistant Attorney General*
*of Wisconsin*

*Counsel for Appellees*
*Attorneys Board of*
*Professional Responsibility,*
*State of Wisconsin*

# Appellant's Reply Brief

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Case No. 81-478

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

STEPHEN D. RABIDEAU,

Appellant,

vs.

ATTORNEYS BOARD OF PROFESSIONAL RESPONSIBILITY, STATE OF WISCONSIN,

Appellee.

On Appeal From the

Supreme Court of Wisconsin

# BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

STEPHEN D. RABIDEAU
Appellant Pro se

9925 Lyndale Ave. South
Bloomington, Minnesota 55420
(612) 874-7475

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Case No. 81-478

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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STEPHEN D. RABIDEAU,

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ATTORNEYS BOARD OF PROFESSIONAL RESPONSIBILITY, STATE OF WISCONSIN,

Appellee.

---

On Appeal From the

Supreme Court of Wisconsin

---

# BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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## QUESTION PRESENTED

(Appellee, in stating its version of the question presented, apparently

intends to gallantly but gratuitously take the affirmative on what appears to be a novel constitutional doctrine, constitutionally-permissible vagueness. However, a more accurate framing of the precise issue follows:)

Does Wisconsin Supreme Court Rule SCR 21.05(1) violate due process as required of states by Amendment XIV, United States Constitution, by reason of unconstitutional vagueness of the term therein, "moral turpitude"?

## CORRECTION OF APPELLEE'S STATEMENT OF THE CASE

Appellee, in its Statement of the Case, states that contributing to the delinquency of a minor, a violation of Wisconsin Statutes (1979) §947.15(1)(a), is a felony. This material misstatement must be corrected. In point of fact, a violation of sec. 947.15(1)(a) is a misdemeanor, as so defined by Wisconsin

Statutes (1979), §947.15 (intro.).

ARGUMENT IN OPPOSITION TO MOTION TO DISMISS

I. THE JURISDICTIONAL STATEMENT SUFFICIENTLY COMPLIES WITH RULE 15.1(e) AND (h).

Appellee asserts that appellant has failed to comply with the requirements of Rule 15.1(e) and (h). The inclusion within the Jurisdictional Statement of grounds upon which federal jurisdiction of this case rests is so obvious as hardly to require reference here to the Jurisdictional Statement, pages five through seven, where such grounds appear. The basis of jurisdiction in this case is 28 U.S.C. 1257(2), "in that the judgment aforesaid of the Supreme Court of the State of Wisconsin held in favor of the validity of a rule of said court, having the effect of statute of said state, against appellant's contention of its

repugnance to the Constitution of the United States," as was stated succinctly in the Jurisdictional Statement. This basis is so self-evident from the face of sec. 1257(2) that no case citation is necessary. Despite appellee's carping objection to the lack of such citation, appellee itself offers no case citation contra the existence of such grounds of jurisdiction. It is submitted that there simply is no such contrary authority. Nor is appellee deceived as to the grounds of jurisdiction. Appellee itself adequately paraphrases the grounds of jurisdiction at the top of page three of its Motion to Dismiss. It is therefore to be assumed that this objection by appellee is strictly pro forma. It need not be dignified by further comment.

Appellee also suggests that the further requirement that the Jurisdictional statement include a statement of

reasons why the questions presented are considered to be so substantial as to require plenary consideration has not been complied with. Again, reference to appellant's Jurisdictional Statement, pages twelve through sixteen, proves the existence of such statement of reasons. Appellee's real objection, therefore, must be taken to be to the sufficiency of such statement of reasons. At page three of its Motion, appellee sets up a "straw-man," inaccurate caricature of appellant's contention of the substantial nature of the federal question involved. The real argument in the Jurisdictional Statement is that, in view of judicial "admissions of the lack of any firm definition for" "moral turpitude," and "of the vague and indefinite nature of that phrase," and in view also of "the amorphous, circular" and contradictory definitions given for that

phrase as ruling case law in different states and within given states, that phrase is unconstitutionally vague. The response to appellee's objection to the lack of case citations on the doctrine of vagueness is that the doctrine has "never been decided by this Court in the present context." (Jurisdictional Statement, page twelve) Yet, contrary to appellee's assertion, appellant has discussed the application of the vagueness doctrine at pages fifteen and sixteen. Therefore, appellee's objections regarding compliance with Rule 15.1(e) and (h) are not well-founded and should be disregarded.

II. THIS APPEAL PRESENTS A SUBSTANTIAL FEDERAL QUESTION.

Appellee cites certain cases of this Court in what is essentially a preview of its argument on the merits. None of those cases, however, stands as authority that no substantial federal question is

presented by this appeal. Indeed, the very fact that the Court has found such repeated occasions requiring consideration of such collateral issues as in such cases stands as powerful evidence of the substantiality of the question now squarely presented.

Appellee cites Ex Parte Wall, 107 U.S. 265 (1882), as if it were some talismanic touchstone. In fact, the holding of Ex Parte Wall has nothing to do with the question presented herein. Indeed, in Ex Parte Wall, p. 273, where no such term of "moral turpitude" was challenged, the Court, through Justice Bradley, noted that it was then contemplated that only "[i]f convicted of a misdemeanor which imports fraud or dishonesty" would an attorney be disbarred (emphasis supplied). (See also comments on pages 275 and 283.) Justice Field, in his dissent, more succinctly sets out this

observation, using terms such as "fidelity," "integrity and trustworthiness" and "crimen falsi" at pages 303, 304 and 310.

Appellee further believes that Arnett v. Kennedy, 416 U.S. 134 (1974); Colten v. Kentucky, 407 U.S. 104 (1972); Jordan v. DeGeorge, 341 U.S. 223 (1951); and United States ex rel. Volpe v. Smith, 289 U.S. 422 (1933), prevent any substantial federal question from arising here, despite the fact that in none of those cases was the vagueness of the term "moral turpitude" in question. As was stated in Jordan v. DeGeorge, supra at 229: "The question of vagueness was not raised by the parties nor argued before this Court." In Arnett v. Kennedy, supra, where the issue of vagueness was raised, the questioned language was fundamentally distinguishable from that present here, in that the very words

"for such cause as will promote the efficiency of the service" (emphasis supplied) themselves offered standards of judgment with reference to some objectively definite criterion. Difficulty of application does not arise to the same ethereal plane as impossibility of objective application, as here. It has repeatedly been recognized by this Court that a noncriminal statute is unconstitutionally vague where men of common intelligence must necessarily guess at its meaning. Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 57 S.Ct. 139 (1936); Neblett v. Carpenter, 305 U.S. 297, 59 S.Ct. 170 (1938); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675 (1967). In this case, men even of extraordinary intelligence cannot be certain of the meaning and application of the term, "moral turpitude."

Contrary to the offhand obiter dicta offered at Jordan v. DeGeorge, p. 229, the real question is not how grave a crime is required to constitute a crime involving moral turpitude, but whether the phrase has any meaning sufficient to discern those which do involve such from those that do not. It is clear that this critical distinction in vagueness doctrine escaped the author of the passage at 341 U.S. 229.

For this reason also, appellee's reliance upon Colten v. Kentucky, supra, is especially inappropriate. As a matter of due process, it has been held that no one may be required, at the peril of life, liberty or property, to speculate as to the meaning of a penal statute; all are entitled to be informed as to what the state commands or forbids. Hynes v. Oradell, 425 U.S. 610, 96 S.Ct. 1755 (1976); see also Colautti v. Franklin,

439 U.S. 379, 99 S.Ct. 675 (1979); and Dunn v. U.S., 442 U.S. 100, 99 S.Ct. 2190 (1979). Whether or not the present regulation is viewed as penal in character in its present context, were it a criminal statute instead, in light of Hynes v. Oradell, there is no doubt that it would be void for vagueness. Hence, the quoted statement from Colten v. Kentucky, supra, could not save it.

Arnett v. Kennedy, supra, should not be construed as any more applicable here than Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618 (1939); Palmer v. Euclid, 402 U.S. 544, 91 S.Ct. 1563 (1971); Papachristou v. Jacksonville, 405 U.S. 156, 92 S.Ct. 839 (1972); Coates v. Cincinatti, 402 U.S. 611, 91 S.Ct. 1686 (1971), all of which held equally indefinite phrases to be unconstitutionally vague.

In sum, none of the cases cited by

appellee is controlling of the present question. Hence, none of them alters the substantial nature of the federal question now posed.

Appellee's parting shot at page seven of its motion is to the effect that appellant, as an attorney, had sufficient warning "as to the proscribed conduct." There is no doubt that appellant, even as a citizen, was on at least constructive notice of the criminal prohibitions involved. That notice, so implicitly intertwined with the doctrine that ignorance of the law does not excuse, is simply not the issue here. Rather, it is whether anyone can successfully discern the meaning of "moral turpitude" or predict its application. The innuendo of appellee's assertion is really that appellant, as an attorney, should be somehow magically able to define a sufficiently definite meaning to that

term. The response is that it cannot be done at all. Even appellee does not suggest a manageable definition. Under this light, it can hardly be said that the vagueness of the phrase "moral turpitude" presents no substantial federal question. Despite appellee's ardent desire to avoid that question, it nonetheless exists.

## ARGUMENT IN OPPOSITION TO MOTION TO AFFIRM

### IT IS MANIFEST THAT THE QUESTION RAISED HEREIN IS SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION.

Appellee contends that in light of Barsky v. Board of Regents of New York, 347 U.S. 442 (1954), the question raised herein needs no further argument. However, this case is not identical to or even persuasively similar to Barsky.

In Barsky, the challenge based on vagueness failed precisely because there was no further element, required for

the imposition of some form of discipline, which could be differently construed. As this Court said, at 347 U.S. 448:

> ". . . the provision is extremely broad in that it includes convictions for any crime in any court of competent jurisdiction within or without New York State. This may be stringent and harsh but it is not vague. The professional standard is clear. The discretion left to enforcing officers is not one of defining the offense. It is merely that of matching the measure of the discipline to the specific case." (Emphasis supplied.)

Assuming arguendo that "[u]nder the Barsky ruling therefore, the Wisconsin regulation could define misconduct as conduct that violates a criminal statute and such regulation would pass due process muster," Wisconsin has chosen to add a further element to misconduct

justifying imposition of discipline, namely, "moral turpitude." To borrow a turn of the coin from the opinion below, as cited by appellee at pages eight and nine of its Motion, in the first place, the bar of a state, acting through its supreme court, which has enacted a disciplinary regulation requiring proof of two elements, one of which is vague, should not be heard to claim constitutionally sufficient notice had it only required proof of the first, non-vague element. Having chosen to include an extra element beyond the criminal violation as a basis for discipline, such argument amounts to an attempt to dismiss that extra element as a non-requirement. If the Supreme Court of the State of Wisconsin in retrospect views the inclusion of the term "moral turpitude" as unwise or unnecessary, then let it delete such term. Until then, however, its vagueness must be

constitutionally scrutinized. The term was employed below. Whether or not the term is required under Ex Parte Wall, supra, or Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752 (1957), it cannot be said not to matter. (See: Ashton v. Kentucky, 384 U.S. 195, 86 S.Ct. 1407 (1966).) Use of the term renders it impossible to know in advance under what circumstances bar discipline may be imposed.

Far more on this point than Barsky is Czarra v. Board of Medical Supervisors, 25 App.D.C. 443 (1905), wherein a statute providing for revocation of a physician's license for "unprofessional or dishonorable conduct" was held void on the ground of vagueness. Neither the words there nor the present phrase have any reasonably definite generally accepted meaning. As the court in Czarra pointed out, what conduct may constitute

the forbidden conduct amounts to a mere matter of opinion. The same observation applies here equally.

Hence, use of the term, "moral turpitude" has deprived appellant of due process within the Fourteenth Amendment. That deprivation by virtue of vagueness presents manifestly a question so substantial as to require and merit plenary consideration, and ultimately reversal.

## CONCLUSION

For the reasons cited upon the above authorities, the Court should deny appellee's alternative Motion to Dismiss or Affirm, and should note probable jurisdiction of this appeal and set the cause for plenary consideration.